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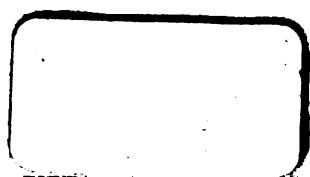
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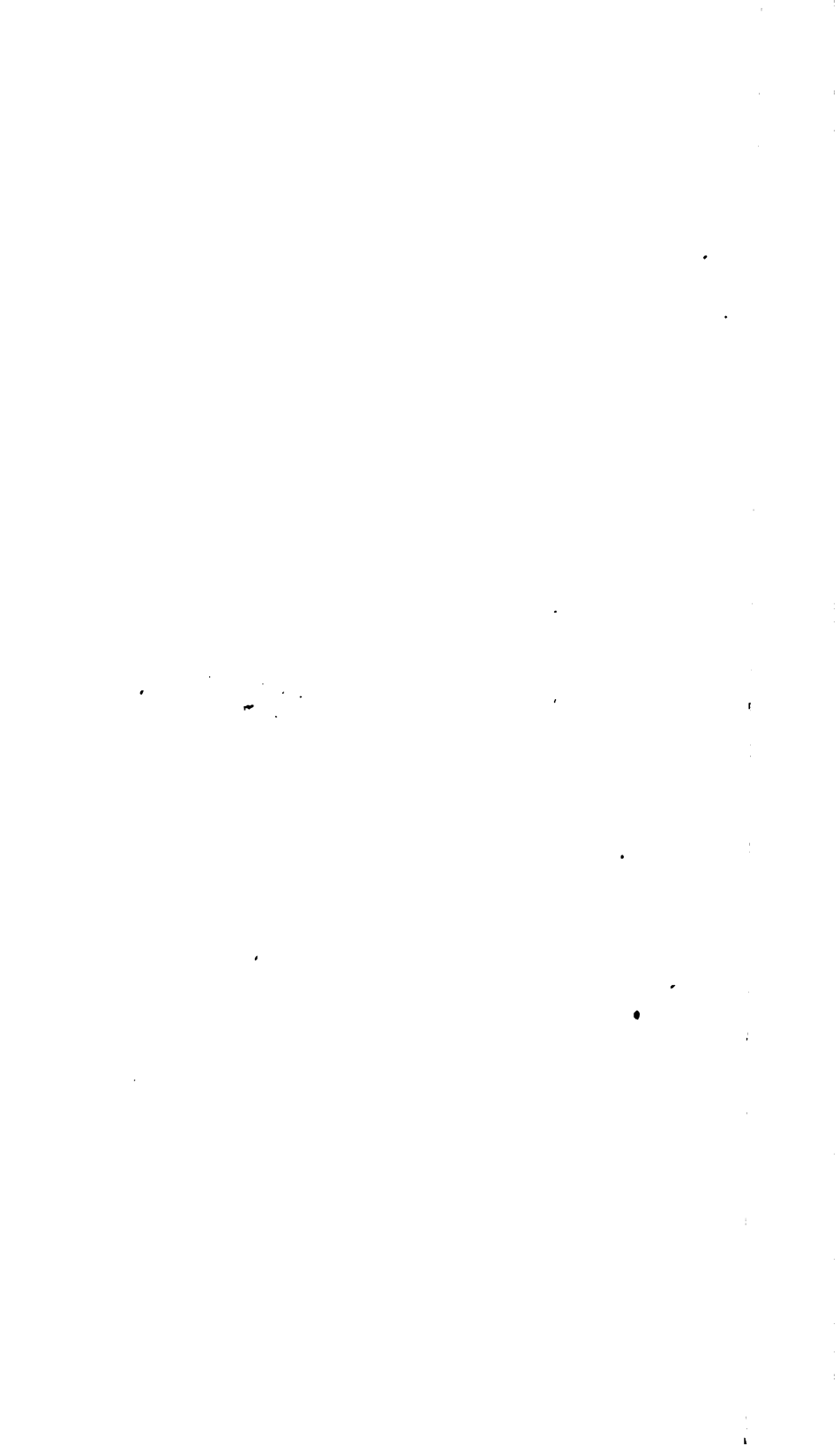
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Englisch

B

(1)



NEW CASES

IN

Act. Burt.
The Court of Common Pleas,

AND

OTHER COURTS.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

By PEREGRINE BINGHAM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. I.

FROM TRINITY TERM, 4 WILLIAM IV. 1834, TO
EASTER TERM, 5 WILLIAM IV. 1835,
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JUN 27 1901

J U D G E S
OF
THE COURT OF COMMON PLEAS,
DURING THE PERIOD CONTAINED IN THIS VOLUME.

The Right Hon. Sir NICHOLAS CONYNNGHAM
TINDAL, Knt. Ld. Ch. J., &c.

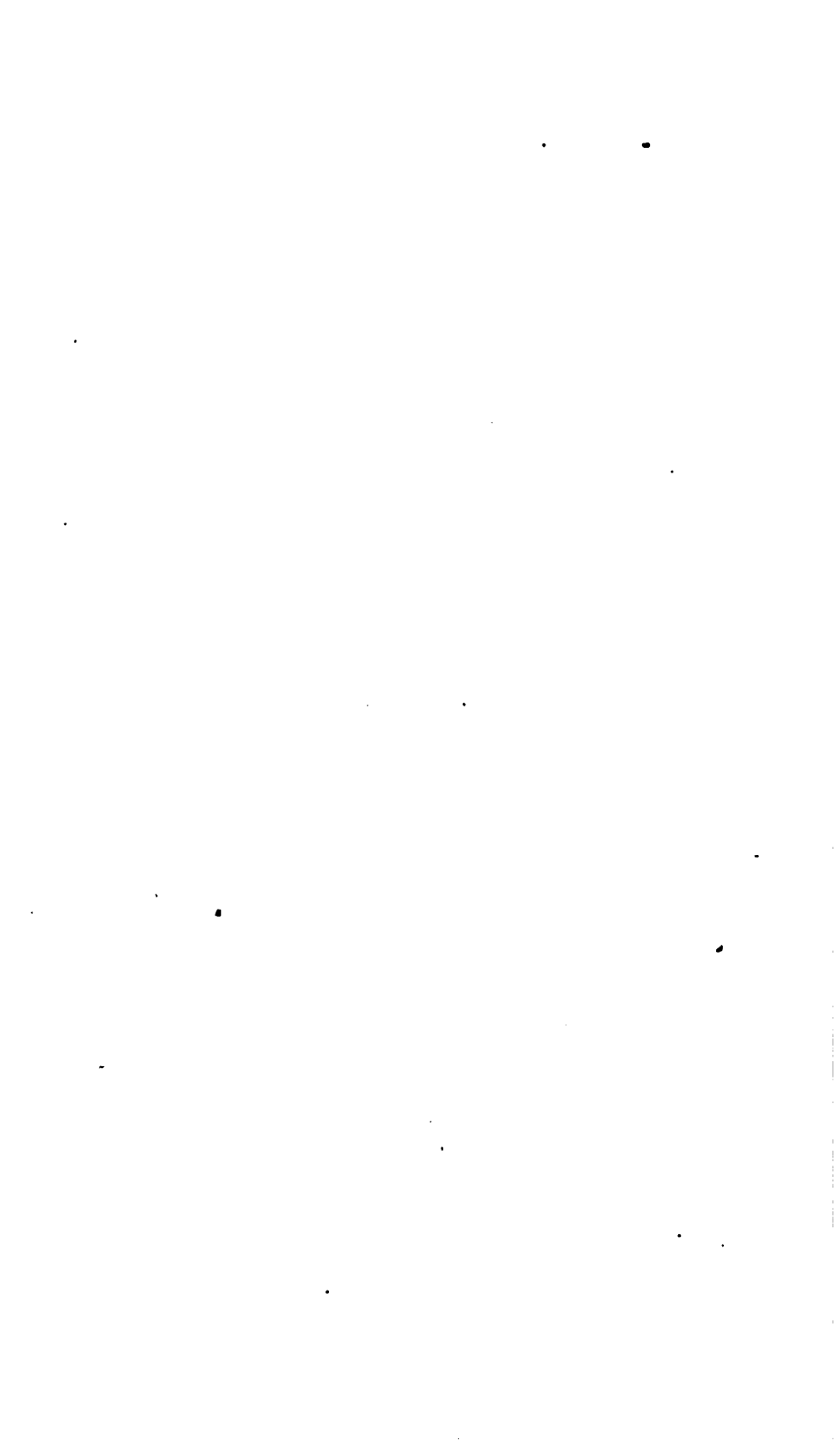
Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

Hon. Sir EDWARD HALL ALDERSON, Knt.



A
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OF
THE NAMES OF CASES
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CORRIGENDA.

Page 68. line 8. from the top, for "discharged," read "absolute."

168. line 6. from the top, for "contingent," read "vested reversionary."

ADVERTISEMENT.

MY REPORTS of CASES argued and determined in the Court of COMMON PLEAS and other COURTS, having now reached a tenth volume, it has been thought expedient that another Series should be commenced, under the name of NEW CASES in the Court of COMMON PLEAS and other Courts.

The recent change effected in the Court of Common Pleas, by the abolition of the exclusive privilege of practising in that Court, hitherto attached to the rank of Serjeant, and the promulgation of the New Rules of Pleading and Practice, concur in rendering the present Term a convenient time for commencing the New Series.

The New Rules will, probably, give rise to numerous decisions on points of Practice, and novel questions and forms in Pleading. Points of this description will receive particular attention ; and new forms of the several pleadings will be given at length.

Trinity Term, 1834.

P. BINGHAM.

NEW CASES

IN THE
COURT OF COMMON PLEAS, 1834.
AND
OTHER COURTS.

Trinity Term,

IN THE
FOURTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were;

TINDAL C. J.	GASELEE J.
PARK J.	BOSANQUET J.

COCKMAN v. HELLYER.

May 22.

BUTT moved to enter up judgment on a warrant of attorney. His affidavit stated, that the Defendant was alive the day *before* this term.

The old rule, which requires an affidavit that the Defendant is alive on a day *in* term, being grounded on the relation which judgments formerly had to the first day of term, and the judgment, according to the new rules, relating to the day on which it is signed,

The affidavit in support of a motion to enter up judgment on a warrant of attorney, need not now state, as formerly, that the Defendant was alive on a day *in* term.

The Court acceded to the application supported by the affidavit as above.

Rule as prayed.

1834.

May 23.

ROBERTS v. WEDDERBURNE.

The writ of *capias*, and writs which purport to be a continuance of it, must state the place where the defendant resides, and, if that be unknown, the place where he is supposed to reside.

IN this case, after a *capias* and *alias* had been issued, describing the Defendant as of *Chesterfield Street, May Fair*, in the county of *Middlesex*, he was detained upon a *pluries capias*, in which a blank was left for his place of residence.

The service of this *pluries capias* was set aside by an order of *Bosanquet J.*, because the writ did not disclose the actual or supposed residence of the Defendant, as required by the schedule (Form No. 4.) of the uniformity of process act.

Wilde Serjt., upon an affidavit that, between the issuing of the *capias* and *pluries*, the Defendant had quitted his residence in *Chesterfield Street*, and, as it was believed, had gone abroad, and that the Plaintiff was unable to discover his residence,—obtained a rule *nisi* to discharge the order made by *Bosanquet J.*

Merewether Serjt., who shewed cause, contended, that the act was imperative, and that there could be no sufficient reason for omitting to insert a supposed residence where the actual abode of the party is unknown.

Wilde. The act is remedial; and was passed to facilitate the access to justice by the removal of technical obstructions. It ought, therefore, to receive a liberal construction; and, in matters which are not of importance to the parties, must be considered as directory only, not imperative. It must be altogether immaterial to the Defendant whether his residence is stated in the

1. H. v. W. 306

writ or not. But, if it were material, *lex neminem cogit ad impossibilia*. Assuming that the Plaintiff ought to state the Defendant's residence where he knows or can guess at it, still he would be misleading all whom it might concern, if, when he neither knows nor can suppose where the Defendant's residence is, he were to name a place at random. In such a case he best conforms to the statute by leaving a blank, as here.

Cur. adv. vult.

1834.

ROBERTS
v.
WEDDER-
BURN.

TINDAL C. J. In this case, the Defendant has been arrested upon a *pluries* writ of *capias*, wherein there is a blank left for his place of residence, after a *capias* and *alias* had been issued, describing the Defendant as of *Chesterfield Street, May Fair*, in the county of *Middlesex*.

The question which has been argued before us has been, whether service of the present writ is irregular and ought to be set aside; and it is the opinion of a majority of the Judges, that such is the case. The act for uniformity of process enacts, by section 4, that where it is intended to arrest the Defendant, the process shall be by writ of *capias*, according to the Form No. 4., contained in the schedule; and, upon reference to that form, it is clearly intended that the residence of the party shall be described, both in the writ of *capias*, and in those writs which purport to be a continuance of it. In what manner, and to what degree of strictness this description is necessary, will appear by section 1.; for although the enactment in that section relates to writs of summons only, it shews by analogy what was the intention of the legislature in this respect, viz., the place or county of the residence, or supposed residence, of the Defendant, wherein the Defendant shall be or shall be supposed to be; so that it is difficult to conceive any case in which the Plaintiff can be at a loss to comply with one of these requisites: at all events, that difficulty

1834.

ROBERTS
v.
WEDDER-
BURN.

does not apply to the present case, where the two preceding writs, of which this is the continuance, had given him a description.

Upon the ground that it is much better for the public to adhere, in all practicable cases, to the strict, close, literal compliance with the forms prescribed by the act, rather than to yield to particular cases of supposed hardship on individuals, when those requisites have not been formally complied with, we think the rule for setting aside Mr. Justice *Bosanquet's* order must be discharged, and that this writ and subsequent proceedings must be set aside for irregularity.

Rule discharged.

June 5.

LINDREDGE v. RICHARD ROE.

The actual or supposed place of the Defendant's residence must be stated in that part of the body of the writ prescribed by Schedule, No. 4., 2 W. 4. c. 39.

It is not sufficient to indorse it on the writ.

IN this case *Archbold* obtained a rule *nisi* to cancel the bail bond, the Defendant's residence being indorsed on the copy of the writ served, instead of being inserted in the body of the instrument, according to the form given in the Schedule, No. 4., to 2 W. 4. c. 39.

Austin, who shewed cause, contended that the specification of the Defendant's residence on any part of the writ was a substantial compliance with the act; and, in this respect, distinguished the present from the preceding case of *Roberts v. Wedderburne*, where the defendant's residence was nowhere stated.

The irregularity here, if any, was one from which no detriment could arise to the Defendant; and the statute would be a trap for suitors instead of a remedial enactment, if it were construed with such literal rigour. The

statute prescribes the insertion of the Defendant's residence *in* the writ. The schedule indicates, for the place of insertion, the first place where the Defendant's name occurs, — "We command you that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and take *C. D.* of —." Suppose the Plaintiff were to omit the Defendant's residence there, and to insert it at the next mention of the Defendant's name, — "and him safely keep," "until the said *C. D.* of *Parliament Street*, in the county of *Middlesex*, shall, by lawful means, be discharged," &c. The Defendant's residence would be thus pointed out *in* the writ, and it could scarcely be contended the statute had not been obeyed. If so, an indorsement which gives the same information, on the same instrument, ought to be held sufficient.

1834.

—
LINDREDGE
v.
ROE.

Sed per Curiam. That would not be a compliance with the form prescribed by the schedule, and the statute requires that such shall be the form employed. Where a form is given, there can be no difficulty in pursuing it; and it is best, in such a case, to enforce a literal compliance with the directions of the legislature.

Rule absolute. (a)

(a) See *Price v. Husley*, 2 Crompt. & Mee. 211.

1834.

May 23. ALLEN and Wife v. WOOD, Administrator of GRIMMETT.

Rents devised to a female *durante viduitate*, do not pass over to the remainder-man upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband.

And the party who thus holds himself out, is not, by so doing, estopped to shew the invalidity of the marriage.

THE Plaintiff and his wife, who was the daughter of one *Fuller*, sought, by this action of money had and received, to recover the amount of certain rents and profits received by *Grimmett*, the intestate.

At the trial the Plaintiffs put in the will of *Fuller*, by which he left these rents to his widow for life, provided she should continue unmarried, and, in case of her marrying again, they were to belong to his daughter, the Plaintiff's wife.

The Plaintiffs then proved that, about ten years ago, Mrs. *Fuller* had been ostensibly married to *Grimmett*, after banns of marriage published in her maiden name; that she had lived with *Grimmett* till her death, about two years ago, when he attended her funeral in the character of husband, and erected a monument to her memory, with an epitaph, in which he styled her his wife. The lady, however, had concealed the marriage, and as long as she lived, continued to receive the rents as the widow of *Fuller*.

Tindal C. J., before whom the cause was tried, considering, on the authority of *Rex v. Tibshelf* (a), that Mrs. *Fuller* and *Grimmett* had never been married, the Plaintiff was nonsuited, with leave to move to set the nonsuit aside: accordingly,

Spankie Serjt. obtained a rule *nisi* to that effect, on the ground that *Grimmett*, having held out Mrs. *Fuller* to the world as his wife, his representative was now estopped to say there had been no legal mar-

(a) 1 B. & Adol. 190.

riage. The intestate could not take advantage of his own wrong.

1834.

 ALLEN
v.
WOOD.

Wilde and *Andrews* Serjts. shewed cause. It was for the Plaintiffs to establish their title to the rents by shewing that *Mrs. Fuller* had married again. That they failed to establish; and as the rents were received, not on the representation of a marriage between the parties, but by the suppression of any such fact, the intestate could not be said to take advantage of his own wrong. It was no more competent to the Plaintiffs to rely on what they called a marriage in substance and effect, than it was for a defendant, in an action for a libel, to rely on shewing that, in substance and effect, the libel was true. In *Weaver v. Lloyd (a)*, where a libel charged the plaintiff with various acts of cruelty to a horse, and amongst others with knocking out an eye, and the defendant pleaded that the charge was true in substance and effect, the jury having found that it was true in all particulars, except that the eye was not knocked out, it was held that the justification was not proved, and that the plaintiff was entitled to a verdict on that plea.

Spankie. The Plaintiffs shewed a sufficient marriage within the meaning of the condition in *Fuller's* will, by shewing that the intestate held out *Mrs. Fuller* as his wife; and he having lived as in a state of marriage, his representative cannot now set up and take advantage of his turpitude and concubinage. A party who has conveyed property to give a colourable qualification, is not permitted to say he has not conveyed: *Doe v. Roberts. (b)* So, in *Crocker v. Fothergill (c)* there was a demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under

(a) 2 B. & C. 678.

(c) *Ibid.* 652.

(b) 2 B. & Ald. 367.

1884.

—
 ALLEN
 v.
 WOOD.

the surface of other lands not demised; the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default. The declaration in ejectment did not mention mines at all; but the sheriff, in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig: it was held, that although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent, under the statute of 11 G. 2. c. 19., the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig. And iniquity can no more be set up as a defence, than as a cause of action: *Montefiori v. Montefiori.* (a)

At all events, the condition in *Fuller's* will applies as much to an intercourse like this as to a state of marriage; if he objected to marriage, he must have objected still more to concubinage as a *status* for his widow. In effect she was to enjoy the property only *dum sola et casta maneret*.

TINDAL C. J. We may determine this question without infringing the general rule that a party shall not set up his own fraud or wrongful act as a ground of claim or defence. The Plaintiffs here seek to recover certain rents and profits under a clause in the will of *Fuller*, by which he provides that property bequeathed to his widow shall go over to his daughter in case his widow shall take another husband. It is a part of the Plaintiffs' case, therefore, not of the Defendant's, to shew that Mrs. *Fuller's* right to the rents had determined.

(a) 1 W. Bl. 363.

1834.

 ALLEN
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But the Plaintiffs' witnesses, after shewing that *Grimmett* and *Mrs. Fuller* had, indeed, lived together as man and wife, disclosed also, that that which was a marriage in form was no marriage in fact. It has been contended that, *prima facie*, it was sufficient for the Plaintiffs to shew that *Grimmett* and *Mrs. Fuller* were living together as man and wife: but, conceding that, it would have been open to the Defendant to explain the real circumstances of the case; and if so, we could only have held, as was held in *Rex v. Tibshelf*, that this was no marriage. To invalidate a marriage under a false name, it is not necessary there should have been actual fraud. In all the cases cited in the note to *Rex v. Billingshurst (a)*, the Judge took a wider view, and thought that where a false name has been inserted in the banns, though no fraud were intended, the marriage is without banns, and consequently illegal. As in *Wakefield v. Wakefield (b)*, where Sir William Scott stated and approved of that opinion; and in another case, of *Frankland v. Nicholson (c)*, he said, "I do not hold it to be necessary that there should be actual fraud on the individual party; it is enough if the thing leads to a probability of fraud; and this mode of conducting the matter would lead to such consequences and mischief as it is the intention of the legislature to prevent. It seems to me that courts of justice are only following up that intention in preventing such modes as are so obnoxious, and lead to fraud: certainly if this mode was permitted, a man might be married to the wife of another person without the slightest knowledge of the fact; and many instances might be put, in which a liberty of this kind would be extremely grievous." And in several other cases the same doctrine was held by that learned civilian. If, therefore, that which is *ipso jure* is *ipso facto* a void

(a) 3 M. & S. 250.

(c) 3 M. & S. 259.

(b) 1 Phil. 139., 140., in

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marriage, how can it be a marriage which devests the right of the first devisee to the rents in question? The rule for setting aside the nonsuit must be discharged.

PARK J. This is an action to recover certain rents and profits bequeathed by *Fuller* to his widow, with a condition that in case she married again they should go over to her daughter. During her life the Plaintiffs supposed she continued a widow; and unless they shew that she married a second time, they are not entitled to the rents. In order, however, to retain the property, Mrs. *Fuller* did that which does not amount to a marriage; and the Plaintiffs, instead of shewing a marriage, have shewn that which is directly in the teeth of the statute and of all the decisions.

The statute requires that the banns shall be published in the *true* names of the parties; here they were published under a fictitious name, which in effect is no publication at all; insomuch that a minister who should be privy to it would be liable to transportation. The statute goes on to enact that a marriage solemnised without publication of banns or licence shall be null and void to all intents and purposes whatever. Here the publication being in fictitious names, there was no marriage at all, and the circumstance came out in the Plaintiffs' case.

The Plaintiffs, therefore, have failed to establish any title to the rents in question, and the rule must be discharged. But this decision does not in any degree trench on the cases which decide that a man renders himself liable for the debts of a woman with whom he lives in concubinage.

GASELEE J. The claim fails on the Plaintiffs' own shewing.

BOSANQUET J. I am of the same opinion. In order to establish this claim, it was incumbent on the Plaintiffs

to shew that Mrs. *Fuller* had married: but, as there was no marriage, the Plaintiffs' title falls to the ground.

And as to the effect of any representations on the subject, Mrs. *Fuller* represented herself, not as married, but as still a widow. It has been urged, that the testator's meaning was to include an intercourse, such as this, under the word marriage. But we must apply that word in the will to a marriage according to the law of *England*, and not to a contract which the parties may dissolve at pleasure. That would be making the condition in the will a condition *dum sola et casta maneret*: a condition very different from the real one.

Rule discharged.

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WILLIAMS v. HARRIS.

May 23.

THIS was a writ of intrusion, on which the demandant had entered a *nolle prosequi*; whereupon,

Merewether Serjt. obtained a rule *nisi* to tax the tenant's costs, against which

The tenant in a real action is not entitled to costs upon a *nolle prosequi*.

Stephen Serjt., who shewed cause, contended that no costs are given in real actions; *Pilfold's* case (a), *Newman v. Goodman* (b), *Booth on Real Actions*, 74.; and that the statute of 8 *Eliz. c. 2.*, which gives costs on a discontinuance or nonsuit, is confined to personal actions.

Merewether. In *Cooper v. Tiffin* (c), the statute 8 *Eliz. c. 2.* was held to be a remedial act, and by equitable

(a) 10 *Rep.* 116. a.
(b) 2 *W. Bl.* 1093.

(c) 3 *T. R.* 511.

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construction, to give a Defendant his costs on a judgment by *nolle prosequi*, although the language of the act taken strictly would not extend to such a case. Upon the same principle, it ought to be extended to real actions.

TINDAL C. J. The rule must be discharged. The question is, whether, in real actions, the demandant having entered a *nolle prosequi*, the tenant is entitled to his costs. In general in real actions, the tenant is not entitled to costs, because, except in particular cases, of which a writ of intrusion is not one, the demandant is not himself entitled to any.

The words of the statute 23 H. 8. c. 15. which first gave defendants costs, expressly exclude real actions. But it is said, that the subsequent statute of 8 Eliz. having been extended to judgments on *nolle prosequi*, to which it does not strictly apply, ought also, in equitable construction, to be extended to real actions. I think not; because if it were so extended, it would give the tenant costs in many cases, in which the demandant, if he succeeded, would not be entitled to them.

Our judgment, therefore, turns on the ground, that the tenant cannot claim costs except where the demandant, if he succeeded, would be entitled to them; and that this is a case in which, clearly, the demandant would not be so entitled.

PARK J. There can be no equitable construction contrary to the positive words of the act. Now, the title of the act is, an act for avoiding wrongful vexation touching the writ of latitat; and all its enactments apply to personal actions. The decisions have gone far enough.

GASELEE J. From the time of *Elizabeth* to this day, no such attempt as this has been made; this affords a

clear indication of the light in which this statute has been viewed.

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BOSANQUET J. I am of the same opinion. If the suit had proceeded, and the demandant had failed upon verdict, it is clear the tenant would not have been entitled to costs; there is no reason, therefore, why he should have them now.

Rule discharged.

CURTIS and Others, Executors of CURTIS, v. SPITTY. May 27.

THE Plaintiffs declared that the Defendant was indebted to the testator, in his lifetime, in the sum of 50*l.* for the use and occupation of certain tenements and land of the testator, by the Defendant, and at his request, and by the sufferance and permission of the testator, for a long space of time had held, used, occupied, possessed, and enjoyed.

Nil habuit in tenementis is no plea in an action of debt for use and occupation.

Plea, that the testator had nothing in the said tenements and land whereof the testator could suffer or permit the Defendant to have, hold, use, occupy, possess, and enjoy.

Demurrer and joinder.

Petersdorff was to have argued in support of the demurrer; but the Court called on

Stephen Sarge to support his plea.

Nil habuit in tenementis is no plea in *assumpsit* for

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use and occupation. But it is a good plea in *debt* for rent, *Lewis v. Willis* (a), and therefore ought to be held good in debt for use and occupation, which, for convenience, has been substituted for debt for rent. The action of *assumpsit* for use and occupation was given by the statute 11 G. 2. c. 19. s. 14.; it is collateral to the action on a contract for rent upon a demise; *Johnson v. May* (b); and in *Naish v. Tatlock* (c), *Eyre C. J.* said, it does not "seem to have been within the scope and provision of the act to make this remedy (of *assumpsit* for use and occupation) co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the contract for rent." But *debt* for use and occupation, like debt for rent, lay for the lessor at common law. And *Littleton* says (s. 58.), that, except where the demise is by deed indented, *nil habuit in tenementis* is a good plea to debt for rent: *Kemp v. Goodal* (d), *Girling v. Glasse*. (e) It was, for some time, indeed, doubted, whether a party might declare in debt for use and occupation; *Wilkins v. Wingate* (g), *Stroud v. Rogers* (h): when that was once established, the generality of form given by the statute of G. 2. in actions of *assumpsit* was imitated for convenience; *King v. Fraser* (i): but the action of debt for use and occupation, lying at common law, must be attended with the incidents of debt for rent: and the admission of a plea of *nil habuit in tenementis* in the action of debt on a demise is not inconsistent with the rule which precludes a tenant from disputing his lessor's title; for if the Plaintiff can reply a demise by indenture, the Defendant is thereby estopped; *Trevivan v. Lawrence*. (k)

- (a) 1 *Wils.* 314.
 (b) 3 *Lev.* 150.
 (c) 2 *H. Bl.* 323.
 (d) 1 *Salk.* 277.
 (e) *Yelv.* 227.

- (g) 6 *T. R.* 62.
 (h) Cited *Ibid.*
 (i) 6 *East*, 347.
 (k) 2 *Ld. Raym.* 1051. 1
Wms. Saund. 276 (a), note 1.

TINDAL C. J. Admitting, for the sake of argument, that, in an action of debt for rent, a plea of *nil habuit in tenementis* may still be put on record, that action materially differs from the present. In debt for rent the Plaintiff alleges a demise; and it is some semblance of an answer to say, that he had nothing in the premises to demise. This, however, is an action on a by-gone consideration: the declaration states that the Defendant is indebted for the use and occupation of premises, enjoyed at his request, by the permission of the Plaintiff. The action is, in its own nature, collateral to the action on a contract for rent upon a demise; and the plea of *nil habuit in tenementis* does not apply. Such was the opinion of the Court in *Lewis v. Willis*, where it was held that *nil habuit in tenementis* was a bad plea to an action on the case for use and occupation.

The form of action here, is debt for use and occupation;—a form of action not unknown at common law, and not unfrequently resorted to, to avoid the difficulties attendant on debt for rent. The statute 11 G. 2., which recognizes the action on the case for use and occupation, made no other difference than to extend the remedy, and to enable the landlord to sue in that form, notwithstanding the existence of a demise by written agreement. But the action of debt for use and occupation has long prevailed, and has been placed on the same footing as *assumpsit*. That appears from *Stroud v. Rogers*, followed by *Wilkins v. Wingate*, and *King v. Fraser*. The two forms of action of debt and *assumpsit* for use and occupation having so long been considered as standing on the same footing, we cannot, at this time, establish a distinction, and allow that to be a plea to the action of debt for use and occupation which it is not competent to the Defendant to plead to the action of *assumpsit*. The rule in both is the same as in *replevin* on a distress for rent on a parol demise: and, ever since

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1834. the case of *Sullivan v. Stradling* (a), it has been held; as
 ——— in that case, that a plea of *nil habuit in tenementis* to an
 CURTIS avowry for rent on a parol demise is ill.
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 SPITTY. The plea cannot be supported, and our judgment
 must be for the Plaintiff.

PARK J. I cannot see the distinction that has been attempted. As soon as it is established that the action of debt for use and occupation lies, the incidents must be taken to be the same as those of *assumpsit* for use and occupation. It has been contended, that the action for use and occupation, is the creature of the statute; but this is not so; for before the statute, the Courts allowed the lessor, instead of going for a precise rent, to resort to the collateral action of *assumpsit* for what he deserved to have. But it appears from the case of *Stroud v. Rogers* in the note to *Wilkins v. Wingate*, that it is equally competent to a landlord to sue in debt for use and occupation; and that has been held for clear law ever since the case of *King v. Fraser*. The action was substituted for the more ancient form of debt for rent; and is subject to the same incidents as *assumpsit* for use and occupation. Now in *Sullivan v. Stradling*, it was expressly decided that where the demise is by a parol agreement, the tenant cannot plead *nil habuit in tenementis*.

GASELEE J. *Lewis v. Willis* established the principle that a defendant cannot plead *nil habuit in tenementis*, in an action of *assumpsit* for use and occupation; and the action of debt for use and occupation, having been resorted to in lieu of *assumpsit*, must be subject to the same rules. There is no difference in principle between them.

(a) 1 Wils. 208.

BOSANQUET J. I am of the same opinion. The principle that a tenant shall not dispute the title of his lessor in an action of *assumpsit* for use and occupation, is not grounded on any legislative provisions, but is the result of the decisions in actions founded on the statute of 11 G. 2. That statute, it is true, mentions only actions on the case, but the Courts have sanctioned the same short form in the action of debt for use and occupation, and there is nothing in the statute to enable a tenant to plead *nil habuit in tenementis*, to such an action.

The Courts having decided that that plea cannot be pleaded to the action of *assumpsit* recognised by the statute, and that a landlord plaintiff may adopt a similar form of declaring in debt, the same principle must be applied to the plea in debt.

Judgment for the Plaintiff.

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BAKER and Wife, Executrix of HUTCHINS, v.
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May 27.

THE declaration stated, that *John Hutchins* deceased, in his lifetime, at the time of making the indenture thereafter mentioned, was lawfully possessed of a certain messuage or dwelling-house and tenement, situate at, &c., with the appurtenances, for the residue and remainder of a certain term of thirty-one years, commencing from the 25th of *December* 1823, then to come and unexpired therein; and the said *John Hutchins* being so possessed thereof, by a certain indenture, made in his lifetime on the 17th of *December* 1825, between

Lessee for a term of years underleased for a term longer than his own, the under-lessee covenanting to pay rent to lessee: Held, that the executor of lessee might sue the under-lessee

for rent accruing during the continuance of lessee's term.

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the said *John Hutchins* of the one part, and the Defendant on the other part, the counterpart of which indenture, sealed with the seal of the Defendant, the Plaintiffs brought into Court, the date whereof was the same day and year last aforesaid, the said *John Hutchins* for and in consideration of the sum of 100*l.* to the said *John Hutchins* in hand paid, and also in consideration of the yearly sum of money, covenants, and agreements, thereafter mentioned and contained, by and on the part and behalf of the Defendant, his executors, administrators, and assigns, to be paid, kept, done, and performed, assigned unto the Defendant, his executors, administrators, and assigns, the said messuage or dwelling-house and tenement, situate and being as aforesaid, to have and to hold the said messuage and premises thereby assigned, and every part thereof (except as before excepted), unto the Defendant, his executors, administrators, and assigns, from the 29th of *September* then last past, for and during the residue and remainder of the said term of years then to come and unexpired, yielding and paying therefore yearly and every year, during the said residue and remainder of the said term, unto the said *John Hutchins*, his executors and administrators, the yearly sum of 75*l.*, by equal quarterly payments, on the 25th of *December*, the 25th of *March*, the 24th of *June*, and the 29th of *September*, in every year, without any deduction or abatement whatsoever, the first payment to be made on the 25th of *March* 1826. And the Defendant did thereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said *John Hutchins*, his executors and administrators, amongst other things, that he, the Defendant, his executors, administrators, and assigns, should and would pay unto said *John Hutchins*, his executors and administrators, the said yearly sum of 75*l.*, in the propor-

tions and on the days thereinbefore appointed for payment thereof, without any deduction or abatement whatsoever. By virtue of which assignment, the Defendant afterwards, to wit, on the said 17th of *December* 1825, entered into and upon all and singular the said assigned premises with the appurtenances, and became and was possessed thereof, for the residue and remainder of the said term, so to him thereof assigned. The Plaintiffs then averred, that after the making of the said indenture, and during the continuance of the term thereby assigned, and after the death of *John Hutchins*, to wit, on the 25th of *December* 1833, a large sum of money, to wit, the sum of 243*l.* 15*s.* of the said yearly sum of 75*l.* in the indenture mentioned, for divers, to wit, thirteen of the said quarterly payments therein mentioned, according to the form and effect of the said indenture and of the said covenant of the Defendant, became and was due and payable from the Defendant to the Plaintiffs *James and Mary Baker*, as executrix as aforesaid, and still was in arrear and unpaid, contrary to the form and effect of the said indenture and of the covenant of the Defendant in that behalf. That the Defendant, although often requested, had not kept his said covenant, so by him made with *John Hutchins* in his lifetime, but had broken the same; and to keep the same with the Plaintiffs, *James and Mary Baker*, as executrix as aforesaid, had hitherto altogether refused, and still refused, to the damage of Plaintiffs, *James and Mary Baker*, as executrix, of 300*l.*, and thereupon they brought their suit, &c. And brought into Court the letters testamentary of *John Hutchins* deceased, whereby it fully appeared that the said *Mary* was executrix of the last will and testament of said *John Hutchins* deceased, and had execution thereof, &c.

After setting out on *oyer* the deed declared on, the Defendant pleaded that all the estate, interest, right, title,

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term of years to come and unexpired, property, profit, claim, and demand whatsoever, which the said *John Hutchins*, at the time of making the supposed indenture in the declaration mentioned, or at any time afterwards, had of and in the premises with the appurtenances in the declaration mentioned, were derived by him under and by virtue of a certain indenture, made the 1st of *August* 1824, between Sir *Richard Sutton* of the one part, and *John Hutchins* of the other part, and sealed with the seal of the said Sir *Richard Sutton*: by which indenture Sir *Richard Sutton* demised and let to *John Hutchins*, all the premises with the appurtenances mentioned in the declaration, (except as therein excepted,) to have and to hold the same unto the said *John Hutchins*, his executors, administrators, and assigns, from the 25th of *December* then last past, for and during and unto the full end and term of thirty-one years from thence next ensuing, and fully to be complete and ended, at and under a certain yearly rent, to wit, the yearly rent of 35*l.* thereby reserved and made payable to the said Sir *Richard Sutton*: by virtue of which demise, the said *John Hutchins*, in his lifetime, afterwards and before the making the supposed indenture in the declaration mentioned, to wit, on the 1st of *August* 1824, entered into and upon all and singular the said premises with the appurtenances so demised to him, and being the premises with the appurtenances in the declaration mentioned, and became and was possessed thereof for the term so to him thereof granted as aforesaid; and the said *John Hutchins* being so possessed thereof, he afterwards, and in his lifetime, and during the term granted by the said indenture of the 1st of *August* 1824, to wit, on the 17th of *December* 1825, by a certain indenture then and there made between him the said *John Hutchins* of the one part, and the Defendant of the other part, and sealed with the seal of said *John Hutchins*,—[but

which said last-mentioned indenture, and the estate, term, and interest thereby demised and granted, after the making thereof, and long before the time of the commencement of this suit, and long before any part of the said supposed sum in the supposed indenture in the declaration mentioned became due, if the same or any part thereof ever did become due, to wit, on the 4th of *November* 1830, to wit, at, &c. were bargained, sold, assigned, transferred, and set over by the Defendant to one *Thomas Smith*, and the said indenture was then and there delivered by the Defendant to the said *Thomas Smith*, and was then in the power, custody, or possession of the said *Thomas Smith*, so that the Defendant could not produce or shew the same to the Court, and of this last-mentioned indenture, the supposed indenture in the declaration mentioned was the counterpart,]—under-demised and leased to the Defendant, his executors, administrators, and assigns, all the premises with the appurtenances demised to him, the said *John Hutchins*, by Sir *Richard Sutton*, by the indenture of the 1st of *August* 1824, except as therein excepted, to have and to hold the same to him the Defendant, his executors, administrators, and assigns, from the 29th of *September* 1825, for and during the term of thirty years from thence next ensuing, and fully to be complete and ended; yielding and paying therefore, yearly and every year during the said term thereby granted, unto said *John Hutchins*, his executors, administrators, or assigns, the yearly rent or sum of 75*l.* by equal quarterly payments. That the Defendant did, in the said indenture of the 17th of *December* 1825, covenant, promise, and agree, to and with the said *John Hutchins*, his executors, administrators, and assigns, amongst other things, that he, the Defendant, his executors, administrators, and assigns, should and would well and truly pay to said *John Hutchins*, his executors, administrators,

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or assigns, the said yearly rent or sum of 75*l.* on the days therein before mentioned for payment thereof, without any deduction or abatement whatsoever; but the said *John Hutchins* did not, by the last mentioned indenture or otherwise, reserve or retain to himself, or his executors, administrators, or assigns, or otherwise, nor had the said *John Hutchins*, at the time of his death, any reversion of or in the said premises or any part thereof. That the said indenture of the 17th of *December* 1825 was the supposed assignment in the declaration mentioned; and that the said *John Hutchins* afterwards, and before any part of the supposed sum in the the declaration mentioned, and which was the rent reserved and made payable by the indenture of the 17th of *December* 1825, became due or payable, if any such ever did become due or payable, to wit, on, &c. at, &c. died: and so the Defendant said that the Plaintiff and the said *Mary*, as executrix, did not take or derive any estate, right, title, interest, term of years to come and unexpired, property, profit, claim, or demand whatsoever, of, in, or to the premises with the appurtenances, so underdemised and leased by the said *John Hutchins* to the Defendant, and so being the premises in the declaration mentioned, or any benefit, power, or right to sue upon the said covenant of the Defendant for payment of the said yearly rent or sum of 75*l.* reserved by the said last mentioned indenture; or for the said sum of 243*l.* 15*s.* in the declaration mentioned, and thereby sued for, and which was stated and appeared in and by the declaration to have accrued due after the death of said *John Hutchins*: and that, the Defendant was ready to verify, wherefore, &c.

Demurrer and joinder.

Stephen Serjt. in support of the demurrer.

The point intended to be raised by the Defendant is,

that the Plaintiffs' testator, by having granted an under-lease for a term exceeding in length that for which he himself held the premises, parted with all transmissible interest; that the covenant to pay rent is incident to the reversion; and that no reversion remains in respect of which the Plaintiffs can sue.

But though rent is incident to the reversion, it may also be separated from the reversion; *Co. Litt.* 98. a. 151. b.; and the Defendant is liable on his express covenant, notwithstanding the testator might be without any reversion. The deed between him and the Defendant amounts to an assignment of the testator's term; *Hicks v. Downing* (a); and where a lessee assigns his term, stipulating that the assignee shall render rent, the lessee may sue, although he cannot distrain for the rent: *Smith v. Mapleback* (b), *Com. Dig. Debt*, C. E., *Newcome v. Harvey* (c), *Lloyd v. Langford* (d), *Bro. Abr. Dette*, pl. 59., — *v. Cooper*. (e) If the Plaintiffs cannot sue, there is no other who has any claim; and it would be unjust that the Defendant should occupy without payment. The rent accruing from a leasehold cannot go to the termor's heir.

Coleridge Serjt. contra. What is the operation of the deed between the testator and the Defendant is doubtful, and what the nature of the payment reserved. However, taking the sum reserved by the testator to be not a mere annual payment, as in *Smith v. Mapleback*, but from the periods of reservation and the nature of the premises occupied, to be clearly a rent, as such, it is subject to all the incidents of rent. Strictly speaking, rent cannot be demanded except by him who has the reversion; and though it appears from the cases which

(a) 1 *Ld. Raym.* 99.

(b) 1 *T. R.* 441.

(c) *Carth.* 161. *Ventr.* 242.

2 *Lev.* 80.

(d) 2 *Mod.* 175.

(e) 2 *Wils.* 375.

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have been cited, that a lessee who assigns, reserving rent, may sue his assignee for the same, yet that is only because the assignee is estopped to dispute the title of the party under whom he occupies. But that estoppel does not extend beyond his life; and in the present case the assignor being dead, the Defendant is at liberty to shew that by his death all his interest in the premises ceased, and that there is no reversion in respect of which an action lies. The Plaintiffs are in the condition of a stranger, to whom rent cannot be reserved; *Litt. s. 346.*; and the circumstance that the heir cannot sue, affords no argument to shew that the Plaintiffs can; for there are many cases in which rent becomes extinct, and the party originally liable ceases to be charged: *Thorn v. Woolcombe.* (a)

Stephen. In *Thorn v. Woolcombe* the term granted by the lessor had merged in the inheritance; and upon that account the rent incident to it was held to be extinguished. Here the term by virtue of which the Defendant occupies is still subsisting. Rent service can only be recovered by the reversioner: but the rent sought to be recovered in this action is neither rent service nor rent seck; it is rent reserved by virtue of the Defendant's covenant.

TINDAL C. J. I think the Plaintiffs are entitled to recover. This is an action of covenant, brought on an indenture entered into between the Plaintiffs' testator and the Defendant, by which certain premises held by the Plaintiffs' testator for a term of thirty-one years from *Christmas* 1823, were by him under-demised and leased to the Defendant from the 29th of *September* 1825 for thirty years, the Defendant covenanting to pay

(a) 3 B. & Adol. 586.

the lessor, his executors and administrators, the yearly rent or sum of 75*l.* by equal quarterly payments. It is contended, on the part of the Defendant, that the Plaintiff and his wife, as executrix of the lessor, are not entitled to recover during the continuance of the term. And, first, an objection is made that it is uncertain what is the operation of this deed. I think it amounts to a demise; and I need only refer to the case of *Poultney v. Holmes (a)*, where the defendant having a term for years, whereof one year and three quarters was to come, agreed with the plaintiff that he should have the premises for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease; the plaintiff took possession, and then brought trespass against the defendant for a re-entry; it was objected that that amounted to an assignment of the lease, and was therefore void by the statute of frauds and perjuries, not being in writing; to which it was answered, on the part of the plaintiff, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor; and the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion; and Lord *Hardwicke* C. J. being of the same opinion, a verdict was found for the plaintiff.

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Then, it is asked whether this is a covenant for the payment of a gross sum or for the payment of rent. Upon all the authorities, I consider it a payment in the nature of rent. The cases of *Newcome v. Hardy (b)* and *Lloyd v. Langford (c)*, both referred to by *Comyns (Debt, C. E.)*, shew that where the whole of a term is assigned, a gross sum reserved periodically to the assignor is a payment in the nature of rent. And if it were held otherwise, great injustice might be occasioned,

(a) *Str.* 405.(b) *Carth.* 161.(c) 2 *Mod.* 175.

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as the tenant, if evicted, would have no answer to an action on his covenant for payment of the sum in question; whereas if it be considered as rent, eviction would be an answer to the lessor's claim. As to the case of *Thorn v. Woolcombe*, it amounts to no more than a decision, that when the term is merged in the inheritance, the rent reserved is extinguished: little more than had before been decided in *Webb v. Russell* (a), which excited so much attention at the time, but which has long been recognised as undoubted law. It is a fallacy to say the Plaintiffs sue as assignees of the reversion; they sue on privity of contract; and the contract is one on which they are entitled to recover.

PARK J. and GASELEE J. concurred.

BOSANQUET J. I am of the same opinion. There is no merger of a term here, but a demise from *Hutchins* to the Defendant, with a reservation of a payment in the nature of rent; and the question is, whether the Plaintiff and his wife, as executrix of *Hutchins*, are entitled to sue on a covenant by which the Defendant has engaged to pay the rent or yearly sum of 75*l*. The term being still in existence, I am of opinion they are entitled to sue. They do not sue as assignees of the reversion, but as personal representatives of the testator. They claim the benefit of privity of contract, and towards the Defendant stand in the same situation as the testator if he had lived. Our judgment, therefore, must be for the Plaintiffs.

Judgment for Plaintiffs.

(a) 3 T. R. 393.

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THE first count of the declaration stated, that on the 20th of *October* 1832, to wit, at, &c., by a certain charter-party of affreightment then and there made between the Defendant, master of the good ship or vessel called the *Swallow*, then lying at *Portsmouth*, and the Plaintiffs as affreighters of the said vessel, it was mutually agreed between the Plaintiffs and the Defendant, that the said vessel being tight, staunch, and strong, and every way fitted for the voyage, should proceed in ballast to the *Island of St. Michael's*, or so near thereunto as she might safely get, and after being well and sufficiently ballasted with stone or iron, and not with sand or any thing that might be prejudicial to the cargo, should receive on board from the agents of the affreighters a full and complete cargo of fruit in boxes, which the affreighters bound themselves to ship, not exceeding what she could reasonably stow and carry, over and above her tackle, apparel, provisions, stores, and furniture; and the vessel having been so loaded, should proceed with the said cargo direct to the port of *London*, or so near thereunto as she might safely get, and should there deliver the same: the master should not put into any port with the vessel on her homeward passage, unless compelled by stress of weather or other unavoidable necessity; (restraint of princes and rulers, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, during the Defendant, by charter-party of *October* 20th 1832, agreed to go in ballast from *Portsmouth* to *St. Michael's*, and bring back a cargo of fruit direct to *London*. The charterer was to be allowed thirty-five running days for loading and unloading, to commence on the 1st of *December* then next; and if the vessel did not arrive at *St. Michael's* by the 31st of *January* 1833, the charterer was to be at liberty to rescind the charter-party: Held, that the Defendant was bound to proceed at once to *St. Michael's*, and was not at liberty to make an intermediate voyage for his own purposes, although, notwithstanding such intermediate voyage, he arrived at *St. Michael's* before the 31st of *January* 1833.

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said voyage, always excepted): the freight which should be paid for the said cargo should be 7*l.* 10*s.* per ton, together with ten guineas as a gratuity to the master, for his care and attention to the cargo, according to the clauses and stipulations therein expressed for that purpose: and for the purpose of loading and unloading the said vessel, the affreighters or their agents should be allowed the space of thirty-five running days in the whole, if required; those days should commence on the 1st of *December* then next, provided the said vessel had then arrived at *St. Michael's* and should be in readiness to receive her cargo; (notice thereof being given to the shipper); should continue until she was laden and despatched from her loading port; recommence at her port of discharge on the day after her report at the custom-house and being ready to unload, and should finally cease on her being fully discharged of her cargo: the affreighters or their agents should also be allowed to keep the said vessel on demurrage for the space of ten running days, over and above the days already thereinbefore allowed for loading and discharging, on paying for the same at and after the rate of 3*l.* per day. And it was further agreed, that in case the said vessel should not be arrived at *St. Michael's* and in readiness to receive her cargo on or before the 31st of *January* then next, it should be optional with the agents of the affreighters, whether they should load her or not; and in case they declined loading her, the charter-party should be null and void. (The penalty for the non-performance of the charter-party was 300*l.*) And the charter-party being so made as aforesaid, afterwards, to wit, on, &c. at, &c. in consideration thereof, and that the Plaintiffs, at the special instance and request of the Defendant, had then and there undertaken and faithfully promised the Defendant to fulfil and perform the charter-party, as affreighters of

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the said ship or vessel in all things on their part and behalf to be performed and fulfilled, the Defendant undertook and then and there faithfully promised the Plaintiffs, to perform and fulfil the charter-party of affreightment, in all things on his part and behalf, as such master of the said ship or vessel as aforesaid, to be performed and fulfilled. But although the Plaintiffs had always performed and fulfilled all things in the charter-party mentioned, on their part and behalves to be performed and fulfilled, to wit, at, &c.; and although on the arrival of the ship or vessel at *St. Michael's* aforesaid, they always were ready and willing to have loaded in and on board the said ship or vessel a full and complete cargo of fruit in boxes; and although they had been always ready to pay freight according to the charter-party; and although it was the duty of the master, in pursuance of the charter-party, to have sailed and proceeded with the said ship or vessel from *Portsmouth* without any unnecessary deviation; yet the Defendant, not regarding the charter-party, nor his promise and undertaking, nor his duty in that behalf, but intending to injure the Plaintiffs in that behalf, did not nor would, although not prevented by the restraint of rulers or princes, or any other of the matters or things excepted as aforesaid, after the making of the charter-party, sail from *Portsmouth* aforesaid, with the said ship, and in ballast, to the *Island of St. Michael's* without making any unnecessary deviation therefrom; but on the contrary thereof, after the making of the said charter-party, to wit, on, &c., at, &c., did set sail with and carry the said ship or vessel towards *Oporto*, and on arriving near to *Oporto*, did unnecessarily and improperly sail and proceed back again to *Portsmouth* aforesaid; and thereby did make an unnecessary deviation out of the voyage from *Portsmouth* to the *Island of St. Michael's* in the charter-party mentioned, whereby the ship did not arrive at *St. Michael's* until a long period of time after that at

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which she might have arrived there but for such unnecessary deviation aforesaid. By means of which said premises the ship did not reach the port of *London* with a certain cargo of fruit in boxes, which the Plaintiffs caused to be shipped in and on board the said ship or vessel, on her arrival at *St. Michael's*, until a long time, to wit, two months after she ought in due course to have arrived if she had sailed without unnecessary deviation to *St. Michael's*, according to the true intent and meaning of the said charter-party. By reason whereof the said cargo so loaded on board the said ship or vessel was of much less value than it might and otherwise would have been if the Defendant had performed the voyage without such deviation as aforesaid. And thereby the Plaintiffs lost divers large sums of money, to wit, the sum of 300*l.*; and also the Plaintiffs, by reason of the delay in the arrival of the ship or vessel as aforesaid, were forced and obliged to pay, and actually paid, to certain persons, to wit, to Messrs. *Bayliss & Co.*, and Messrs. *Webb and Pilcher*, to whom the Plaintiffs had sold the cargo, divers large sums of money, to wit, the sum of 260*l.*, to wit, at, &c.

The Defendant pleaded the general issue.

At the trial before *Tindal C. J.* it appeared, that on the 20th of *October* 1832, the Plaintiffs chartered the Defendant's vessel, the *Swallow*, then lying at *Portsmouth*, to proceed in ballast to *St. Michael's*, there to take on board a cargo of fruit, and return direct to *London*. For the purpose of loading and unloading, the freighters were to be allowed thirty-five running days in the whole, if required, to commence on the 1st of *December* then next, provided the vessel should then have arrived at *St. Michael's*, and be in readiness to receive her cargo. The freighters were also to be allowed to keep the vessel ten running days more on demurrage; and if she should not be at *St. Michael's* ready to receive her cargo by the 31st of *January*, then

next, it was to be optional with the freighters to load or not, and to declare the charter-party null and void.

The usual length of the voyage from *England* to *St. Michael's* is a fortnight or three weeks, and the time consumed in loading and unloading, about a week; so that, if the Defendant had sailed direct for *St. Michael's* about the time he executed the charter-party, it might reasonably be expected that he would have delivered his cargo in *London* by the 1st of *January* 1833. Instead, however, of proceeding in ballast direct for *St. Michael's*, the Defendant, on the 7th of *November*, sailed to *Oporto*, with troops for *Don Pedro*, intending to proceed to *St. Michael's* after landing the troops. Being prevented from effecting his purpose by *Don Miguel's* batteries, he returned to *Portsmouth* on the 28th of *November*, relanded the troops, and sailed for *St. Michael's* on the 6th of *December*. He arrived at that island before the 31st of *January*, was loaded with oranges, and arrived in *London* on the 1st of *February*. By that time there was a glut of oranges in the market, and the price had fallen, since the end of *December* (when the season of the *London* market begins), 10s. 6d. a box, which, upon the whole of the *Swallow's* cargo, occasioned a loss of more than 260*l*.

On the 9th of *November*, the Plaintiffs, being informed that the Defendant had sailed for *Oporto*, despatched a letter for him to *St. Michael's*, in which they said, "In having taken the *Swallow* to *Oporto* with passengers, on her way to *St. Michael's*, instead of proceeding direct, we consider you to have deviated from the due performance of the charter-party entered into with us, and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct."

The Plaintiffs were agents for *Brander*, an orange merchant at *St. Michael's*, and in *November*, subsequently to their addressing to the Defendant the letter of the

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9th of that month complaining of his deviating to *Oporto*, they, on the part of *Brander*, contracted to let *Bayliss* (with whom they had negotiated on the 20th of *October*) have 335 boxes of *Brander's* oranges by the *Swallow*, and *Webb* and *Pilcher* 150 boxes, at the market price at *St. Michael's*. The oranges were received by *Bayliss* and *Webb* and *Pilcher*, who paid *Brander* for them.

In the fruit trade, the early ships sail about the end of *October*, and arrive in *London* about the end of *December*: it is advantageous to be early in the market, and *Bayliss* and *Webb* and *Pilcher*, having been led to expect that the *Swallow* would arrive early, called on the Plaintiffs to make good the loss incurred by the fall in the price of oranges in the *London* market, between the end of *December* and the 1st of *February*. The Plaintiffs paid them the difference, amounting, as above, to upwards of 260*l.*, and sought by this action to recover corresponding damages at the hands of the Defendant.

A verdict was taken for 254*l.*, with leave for the Defendant to move to enter a nonsuit, in case the Court should be of opinion that the stipulations of the charter-party were satisfied by his arriving at *St. Michael's* before the 31st of *January* 1833, or to reduce the verdict to nominal damages, if it should be thought the Plaintiffs were not responsible to *Bayliss* and *Webb* and *Pilcher*.

Wilde Serjt. having obtained a rule *nisi* accordingly,

Spankie Serjt. and *Watson* shewed cause.

1st. The stipulations of the charter-party were not satisfied by the Defendant's arriving at *St. Michael's* just before the 31st of *January*. If he did not arrive by that time, the Plaintiffs had the option of rescinding the contract; *Shubrich v. Salmond* (a): but their inten-

(a) 3 *Burr.* 1637.

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God, and his contract, was, that he should proceed without delay and without deviation. This might be inferred from the nature of the trade, in which great advantage is derived from being early in the market; but it is in effect expressly provided for by the stipulation, that the Defendant should proceed out in ballast. The obvious meaning of that stipulation is, that he should not lose time by engaging in any other adventure, or lessen the speed of his vessel outwards by any kind of load. And, even without such stipulation, it is the duty of the captain, upon such a contract as this, to proceed on his voyage without deviation and without delay. Thus, in *Davis v. Garrett (a)*, where the plaintiff put on board defendant's barge, lime, to be conveyéd from the *Medway* to *London*, the master of the barge deviated unnecessarily from the usual course, and, during the deviation, a tempest wetted the lime, and the barge taking fire thereby, the whole was lost; it was held, that the defendant was liable. The same principle is established by *Max v. Roberts. (b)* So, in *Freeman v. Taylor (c)*, the plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the *Cape*, and, having delivered goods there, to proceed with all convenient speed to *Bombay*, where the freighter engaged to put on board a cargo of cotton for *England*. Plaintiff arrived at the *Cape*, and might have proceeded on his voyage in two days; but he remained there ten, taking in cattle for the *Mauritius* on his own account: he went round by the *Mauritius* on his way to *Bombay*, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct: other ships had arrived in the mean time: the freighter refused to load; and, in an action on the charter-party, the jury were directed to consider whether the deviation

(a) 6 Bingham. 716. (b) 12 East, 89. (c) 8 Bingham. 124.

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was such as to have deprived the freighter of the benefit of the contract; and, a verdict being found for the defendant, a new trial was refused. And in *Mount v. Larkins* (a), where the defendant executed, 28th of February 1824, a policy of assurance on freight from *Sincapore* to *Europe*, with liberty to sail to, touch, and stay at, any places whatsoever, to load, unload, reload, and for all necessary purposes whatever; the ship sailed from *London* in September 1823; and, having been detained by the captain, for his own purposes, at *Van Diemen's Land*, did not arrive at *Sincapore* till the 30th of March 1825; she sailed thence on the voyage the 3d of May 1825: it was held, that, by so long a postponement of the risk, the defendant was discharged, a jury having found the delay unreasonable.

The captain must be taken to know the custom of the trade, and the importance of an early arrival in the market: *Vallance v. Dewar*. (b)

2dly. The Plaintiffs are entitled to retain their verdict for the whole amount. It is true that the cargo was consigned to *Bayliss* and *Webb* and *Pilcher*; but the Plaintiffs were impliedly responsible to them for the vessel's early arrival in the market, and for the consequences of her delay. Even as agents or trustees for them, or as consignors, they had such a special property in the cargo as would entitle them to recover damages in trover against the Defendant for loss by improper detention; and, on the same principle, they ought to recover for loss occasioned by the Defendant's delay. In *Moore v. Wilson* (c) it was held, that the consignor might recover against a carrier for non-delivery, although the charge for carriage was to be paid by the consignee: *Davis v. James* (d), *Freeman v. Birch*. (e)

(a) 8 Bingham. 108.

(d) 5 Burr. 2680.

(b) 1 Campbell. 503.

(e) 1 Nev. & Man. 420.

(c) 1 T. R. 659.

Wilde. The fruit market continues in *London* for some months; and though an early arrival may sometimes be advantageous, there is nothing on the face of this charter-party to shew that an early arrival was intended or desired by the Plaintiffs. On the contrary, the stipulation, that the Plaintiffs might rescind the contract if the Defendant did not arrive at *St. Michael's* by the 31st of *January*, leads to the inference that the Defendant's engagement would be satisfied if he arrived by that day. If the Plaintiffs had desired an earlier voyage, they would have inserted an earlier day in that stipulation: and the time allowed for running days and demurrage leads to the same conclusion. In *Max v. Roberts*, *Davis v. Garrett*, *Freeman v. Taylor*, and *Mount v. Larkins*, the time for the voyage was not defined by any such specification of a particular day beyond which the shipowner was to have no claim; and deviation or unreasonable delay expressly appeared. Here, the captain arrived within the specified time; and, provided he accomplished that, he had a right in the interval to employ his vessel as he pleased. With respect to the custom of the trade, he was bound to know the course of the voyage as to stowing and navigating his vessel; but the rise or fall of price in the *London* market is a matter out of his department. Having arrived before the last day stipulated by the Plaintiffs, he must be deemed to have arrived within a reasonable time.

But, at all events, the Plaintiffs are entitled only to nominal damages. The loss occasioned by the fall in the market fell, in the first instance, upon *Bayliss* and *Webb* and *Pilcher*, the consignees of the cargo; and the Plaintiffs, having entered into no agreement that the cargo should arrive within any given time, were under no obligation to reimburse the consignees. The contract for the sale of the oranges to *Bayliss* and *Webb* and *Pilcher* was not entered into till after the Plaintiffs knew

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TINDAL C. J. This case comes before the Court on two distinct grounds. The first, on a motion to enter a nonsuit; the other, that the verdict for 254*l.* be reduced to nominal damages.

We think that the verdict ought to stand, but that it should be reduced to nominal damages.

The broad question is, whether, upon the construction of the charter-party, there has been unnecessary delay in commencing the voyage to *St. Michael's*.

Upon general principles, in all contracts by charter-party, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage; and, after it has been commenced, no deviation.

And the question here is, whether the Defendant sailed within a reasonable time according to the terms of his charter-party. All the authorities concur in stating, that the voyage must be commenced within a reasonable time; and they are all cited and commented upon in *Freeman v. Taylor* and *Mount v. Larkins*. If that be the general rule, where there is any delay in a voyage it is incumbent on the party to account for it. In many cases it may be difficult to say what is a reasonable or an unreasonable time for commencing a voyage. It is better, therefore, to refer to the contract itself, and see whether the voyage performed is conformable to that pointed out by the contract.

Now, looking at this contract, I think, with a view to the object of the voyage, its commencement was delayed an unreasonable time.

The charter-party was entered into the 20th of *October* 1832, and provides, that the *Swallow*, "being tight,

staunch, strong, and in every way fitted for the voyage, shall proceed in ballast to *St. Michael's*."

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I do not lay stress on the stipulation for proceeding in ballast, any further than that it seems to refer to a voyage in which the master should not lie by to take in a cargo, which might delay the ship on her voyage. The instrument then goes on, — "shall there receive on board a complete cargo of fruit; and, having been so loaded, shall proceed with the said cargo direct to the port of *London*." Then, after some stipulations, to which it is unnecessary to refer, — "for the purpose of loading and unloading, the affreighters or their agents shall be allowed the space of thirty-five running days, if required, to commence on the 1st of *December*, provided the vessel should then have arrived at *St. Michael's*, and be allowed to keep the vessel on demurrage ten days over and above the running days."

Now, inasmuch as the parties have stipulated that the lay days shall commence on the 1st of *December*, it may be inferred that they contemplated the voyage to *St. Michael's* should terminate by that day. If, indeed, by any accident or unforeseen cause, which should excuse the master, the vessel should arrive later, the charterer would have no just cause of action: but the intention at the time was, that the object of the voyage should, if possible, take effect from the 1st of *December*. That it *might* have taken effect from that time, is clear; for the voyage usually lasts a fortnight or three weeks, and the vessel sailed for *Oporto* on the 7th of *November*.

The instrument then goes on, "That, in case the vessel should not be arrived at *St. Michael's*, and in readiness to receive her cargo by the 31st of *January* next, it shall be optional with the agents of the affreighters whether they load or not; and in case they decline loading, the charter-party shall be null and void." That was to give the charterer the option of repudiating

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the contract if the vessel should arrive too late for any useful purpose, although, if she had been detained by any justifiable cause, he might have no right of action against the owner.

And all the evidence in the cause goes to shew that the intention of the parties in entering into this contract was such as I have described: the course of the trade in *London*, which requires a speedy voyage, and gives advantages to those who are first in the market; and the letter of the 9th of *November*, in which the Plaintiffs say, "In having taken the *Swallow* to *Oporto* with passengers, on her way to *St. Michael's*, instead of proceeding direct, we consider you to have deviated from the due performance of the charter-party entered into with us, and we hold you liable for all loss or injury which may arise to the parties interested in consequence of your not proceeding direct."

I think, therefore, that, as the commencement of the voyage was, without any justifiable cause, delayed till the 6th of *December*, an action lies for the Plaintiffs.

As to the second point, if the charter-party has been broken, although the Plaintiffs may have incurred no actual damage, the law gives them nominal damages. But the Plaintiffs allege special damage, and it is for them to make out that allegation. They state in the declaration, "that thereby the Plaintiffs lost divers large sums, to wit, the sum of 300*l.*; and also the Plaintiffs, by reason of the delay in the arrival of the ship or vessel as aforesaid, were forced and obliged to pay, and did actually pay, to certain persons, to wit, to Messrs. *Bayliss* and Co., and Messrs. *Webb* and *Pilcher*, to whom the Plaintiffs had sold the cargo, divers large sums of money, to wit, the sum of 260*l.*"

Looking at the evidence, it does not appear that any such contract was entered into by the *M'Andrews*, as agents of *Brander*, with *Webb* and *Pilcher*, and with

Bayliss, as should entitle the latter to sue the *M'Andrews*; or that any cargo of theirs has been kept back for the delay of which *M'Andrews* are responsible to them. The damages, therefore, must be reduced to 1s.

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PARK J. In all contracts by charter-party expedition is of importance, for, by delay, the whole object of the voyage may be defeated: but expedition appears to be peculiarly of importance in the trade in which the Plaintiffs are engaged; and Lord *Tenterden* lays it down, in his work on shipping, that the intention of the parties is to be looked to with reference to the trade in which they are engaged. Looking at this charter-party, I entertain no doubt as to the intention of the parties, that the voyage should be commenced with all reasonable expedition; and the law in our books, on this point, is the same as with foreign nations.

Emérigon (c. 13. s. 10.) discusses the lawfulness of undertaking another voyage pending an insurance. After citing two old cases, in which it had been decided by the *French* courts that such voyage *might* lawfully be undertaken, he observes: — “ Mais cette jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que si, avant que la voyage assuré soit commencé, le capitaine en entreprenne un autre, l'assurance est nulle, et la prime doit être restituée.” This was cited in *Mount v. Larkins*, where the judgment turned on the same general principles; and the same law was laid down in *Freeman v. Taylor*. There, the plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the *Cape*, and, having delivered goods there, to proceed with all convenient speed to *Bombay*, where the freighter engaged to put on board a cargo of cotton for *England*. Plaintiff arrived at the

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Cape, and might have proceeded on his voyage in two days; but he remained there ten, taking in cattle for the *Mauritius* on his own account. He went round by the *Mauritius* in his way to *Bombay*, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct: other ships had arrived in the meantime. The freighter refused to load; and, in an action on the charter-party, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the defendant, the Court refused to grant a new trial.

So, in *Palmer v. Marshall (a)*, *Tindal C. J.* said, "The policy bore date the 28th of *January* 1831, and the vessel remained in the float at *Bristol* from the date of the policy till the 17th of *May*, when she sailed on her voyage, and was shortly afterwards lost. A policy effected in these terms, and in this shape, implies that the voyage insured shall be very shortly commenced, or is, at all events, in the near contemplation of the parties; and when we see that, in the present instance, the voyage was not commenced till the middle of *May*, we are bound to say that the delay was unreasonable, unless it be accounted for." And *Alderson J.* said, "A delay in sailing, in order to be justified, must be a delay incurred for the purpose of the voyage." And there was no reason why this vessel, when the Defendant had entered into the charter-party on the 20th of *October*, should take an intermediate voyage with troops for *Don Pedro*.

But the strongest case is *Davis v. Garrett*, where *Tindal C. J.* says, "We cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship, or hired for the special purpose of the

(a) 8 *Bingh.* 318.

voyage, to proceed without unnecessary deviation in the usual and customary course."

And it is not usual or customary to touch at *Oporto* in the voyage to *St. Michael's*. The whole of the evidence shews, that, though some persons may speculate for cargoes at the close of the season, an early and expeditious voyage to *St. Michael's* gives the merchant an advantage in the market. The number of running days was probably appointed with a view to any accident that might detain the vessel; and the word *direct*, applied to the homeward voyage, does not imply that the master was to be at liberty to deviate on the outward voyage. On this contract, therefore, it seems to me clearly the intention of the parties that the vessel should sail for her destination immediately; and the letter of the 9th of *November* is highly confirmatory of this. With respect to the damages, I at first entertained some doubt; but, as it is admitted that, to entitle the Plaintiffs to sue the Defendant, *Webb* and *Pilcher* should be in a situation to have sued the Plaintiffs, and as there appears to be no contract on which they could have proceeded, I yield to the opinion of the rest of the Court.

GASELEE J. The first point has been so fully discussed, that I shall add no more. There is nothing to take this case out of the general principle so frequently laid down, and particularly relied on in *Davis v. Garrett*.

As to the damages, it is agreed that, before the Plaintiffs can recover against the Defendant, they must make out that they were themselves liable to the suit of *Webb* and *Pilcher*. That, they have failed to establish; and though *Bayliss* began to negotiate on the 20th of *October*, he came to no agreement till near the end of *November*, a

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fortnight after the Plaintiffs had complained that the Defendant had broken the terms of his charter-party; and, even in that transaction, the Plaintiffs appear to have acted rather as agent of *Brander* than on their own account. Nor was the contract with *Webb* and *Pilcher* entered into before the 23d of *November*. I think, therefore, on these grounds, the damages must be reduced.

BOSANQUET J. I am of the same opinion on both points. The general principle is, that he who enters into a contract is bound to perform it within a reasonable time, unless there be provision to the contrary; and I see nothing in this contract to controul the general principle. The vessel is to proceed to *St. Michael's* in ballast; which shews that it was wished she should not be impeded by engaging in other traffic. The lay days are to commence from the 1st of *December*; which shews the time of arrival in the contemplation of the parties; and the charterer is to have the option of being off his bargain if the vessel does not arrive out by the 31st of *January*. That is a stipulation inserted on his behalf to quicken the owner, but does not absolve the owner from using all reasonable expedition. Then, the contract is executed on the 20th of *October*, and the vessel sails on the 7th of *November*; which, under ordinary circumstances, would have brought her to *St. Michael's* by the 1st of *December*. But the captain takes in troops and sails for *Oporto*, which delays him till the 6th of *December*; so that the Plaintiffs have lost the chance of advantage they would have derived from the vessel's early arrival in the market. I consider this clearly a breach of the charter-party, for which an action lies. Then comes the question, what damages they are entitled to. Now, the

Plaintiffs were not principals, but entered into the charter-party for the benefit of others who might ship a cargo; they therefore, personally, have sustained no loss; but if they have entered into any contract by which they have bound themselves to deliver goods by a certain time, and have paid damages upon failing to do so, they may call on the Defendant to make good such loss. However, they do not appear to have been placed in any such circumstances. The contract with *Bayliss* was not entered into till after they had complained of a breach of contract on the part of the Defendant.

The Plaintiffs, therefore, are entitled to retain their verdict, but only for nominal damages.

Rule absolute to reduce the verdict to nominal damages.

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COOPER v. BLANDY and Another.

May 30.

REPLEVIN. The Defendant *Blandy* avowed for two years and a half rent, due from the Plaintiff as tenant to *Blandy*, under a demise of the premises at 60*l.* a year.

The Defendants also made cognizance as bailiffs of *James Temple Mansel*;

And the Plaintiff pleaded *non tenuit*.

At the trial it appeared that the Plaintiff had obtained possession of the premises (the *Three Tuns* tavern in *Fetter Lane*) from *Nightingale*, the preceding occupier,

title to the rent, notwithstanding the Defendant inadvertently put in evidence a document which shewed that the Plaintiff's predecessor occupied under a lease to which the Defendant was in law a stranger.

The Plaintiff came into occupation under one who had paid rent upon distress by the Defendant: Held, that after proof of this fact, the Plaintiff was estopped to dispute the Defendants'

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and had taken *Nightingale's* stock; that *Nightingale* succeeded one *Perry*, and *Perry* one *Nelson*.

The Defendants proved that *Perry* had paid rent to *Blandy* under a distress in *February* 1829, and *Nightingale* in *February* 1831.

The Defendants then put in evidence a deed of *October* 1809, by which *James Temple Mansel* and his wife demised the premises to *Nelson* for thirty-one years.

It appeared, however, that, in 1809 and previously, the legal interest in the premises was in *Alexander* and *Barclay*, the trustees under Mr. and Mrs. *Mansel's* marriage settlement; and that *Alexander*, as agent for the *Mansels*, had often received the rent from *Nelson*.

Mansel and his wife died in 1825; and in *April* 1826, under a decree of the Master of the Rolls, *Alexander* and *Barclay* conveyed the fee simple in the premises to the Defendant *Blandy*, to whom *Mansel* and his wife were largely indebted.

The jury having found a verdict for the Defendants,

Atcherley Serjt., pursuant to leave given at the trial, moved to set it aside and enter a verdict for the Plaintiff, on the ground that the Defendants, after shewing that the Plaintiff occupied the premises by virtue of the lease granted by *Mansel* and wife in 1809, ought, in order to justify a distress for rent, to have gone on and have shewn a conveyance of the reversion from *Mansel* and wife to the Defendant *Blandy*.

Merewether Serjt. shewed cause. The Plaintiff, having come in under *Perry* and *Nightingale*, must stand in the same situation with respect to title as his predecessors. Now *Perry*, in 1829, and *Nightingale* in 1831, submitted to pay rent under a distress made by *Blandy*: after payment under such circumstances they

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were estopped to dispute *Blandy's* title; and therefore the Plaintiff, claiming under them, is estopped also. Where the lessor's estate has expired, and the lessee is exposed to another claimant, he may, in some cases, set up those facts against the lessor's claim: *Rogers v. Pitcher*. (a) But, here, there is no other claimant, nor any evidence that *Blandy's* interest has expired. In *Rennie v. Robinson* (b), where *A.* hired apartments by the year of *B.*, *B.* afterwards let the entire house to *C.*, who sued *A.* in an action of use and occupation for the hire of the apartments, it was held that *A.* could not impeach *C.'s* title; and *Doe v. Parker* (c) is to the same effect.

Atcherley and *Kelly* in support of the rule.

The Plaintiff and his predecessors, *Perry* and *Nightingale*, stand in the situation of *Nelson*, the original lessee under the lease of 1809, from whom they claim. And, as *Nelson* would have been estopped to dispute the title of *Mansel* and wife, the lessors in that lease, or of any who claim under *Mansel* and wife, so is the Plaintiff. But the rule of estoppel goes no further: they may dispute the title of a stranger; and, upon the evidence in this case, the avowant is a stranger to *Mansel* and wife. The payment of rent is only *prima facie* evidence of admission of title, which may afterwards be rebutted by the parties shewing it was paid under a mistake. And, even if it should be thought that, after such payments, the Plaintiff was estopped to produce evidence infirmatory of the avowant's title, yet, when the avowant has himself shewn, by the deeds he has given in evidence, that he has no title to distrain, the Plaintiff may take advantage of what appears on the

(a) 6 Taunt. 202.

b) 1 Bingh. 147.

(c) Peake's Evid. 283. 5th edit.

1834. avowant's own shewing. Here the avowant has shewn that the Plaintiff occupied the premises by virtue of a lease from *Mansel* and wife; and he has shewn no conveyance of the reversion from *Mansel* and wife to himself, no confirmation of the lease, nor any attornment by the Plaintiff. Upon his own shewing, therefore, he has no title to distrain; and, being destitute of such title, he falls within the rule established in *Rogers v. Pitcher*. In *Fenner v. Duplock* (a) it was held, that payment of rent by a lessee to a lessor after the lessor's title had expired, and after the lessee had notice of an adverse claim, did not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless, at the time of payment, the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired.

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TINDAL C. J. I am unable to perceive any sufficient ground for exempting this case from the ordinary rule which prevails between landlord and tenant, namely, that, where a party has enjoyed land, he is estopped to dispute his landlord's title. Here, the Plaintiff occupied the premises in question from 1831 to 1833. The avowant distrains and avows for two years and a half's rent; and all he is bound to prove under the avowry is, that the Plaintiff was actually tenant at a certain rent, and that the rent was in arrear. It is immaterial whether the Plaintiff occupied under a lease, or as a tenant from year to year. At the trial the Defendant might have confined himself to the fact, that two persons, *Nightingale* and *Perry*, had occupied the premises from 1827 to 1830, and had paid rent to him, 60*l.* a year by quarterly payments. Then, upon proving that the Plaintiff came in under *Nightingale* and *Perry*, the law would have implied a tenancy from year to year. Had

(a) 2 *Bingh.* 10

he confined his proof to those facts, the payment of rent to *Nightingale* and *Perry* under a distress would have been such an acknowledgment of the Defendant's title, as would have precluded the Plaintiff, coming in under *Nightingale* and *Perry*, from raising any dispute. But because the Defendant went further, and unnecessarily put in evidence the deed of 1809, it is contended that he has himself shewn he is not entitled to the rent. That deed is a lease made by *Mansell* and wife, by which they demise the premises to *Nelson*, to hold for thirty-one years; and it is urged that the rent paid by *Nightingale* and *Perry*, was paid in affirmance of that lease, and that the tenants may now say to their landlord, "We require you to go on and shew a conveyance of the reversion to yourself." Why is that necessary? *Nightingale* and *Perry* have already admitted the Defendant's title as landlord. If they apprehended a claim from any other quarter, why did they not dispute his title when he levied a distress for rent? Their abstaining from dispute at that time, is an admission that he had a right to the rent; and why are we to presume, in favour of one who has admitted the landlord's title by payment of rent under a distress, that the landlord is not entitled to receive it?

Whether or not such a payment is in all cases, and at all events, an estoppel which precludes the occupier from shewing that some other person is entitled, we need not decide here. In *Rogers v. Pitcher* it was held, that under some circumstances it may not be an estoppel. But it is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the Plaintiff comes into possession, have admitted the Defendant's title, we are called upon to say he has none. Before calling on us to come to any such conclusion, the Plaintiff should at least shew that he paid the rent to the Defendant by mistake, and that

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some other person is entitled to receive it. So far from that, there was every reason for supposing that the right to distrain was with the Defendant. He had purchased the property, and under that purchase he might be in possession of some other deed, which, under the circumstances, he was not bound to produce at the trial. And the evidence shewed, either that the Plaintiff was dealing with the Defendant as purchaser in fee of the property, or that the lease of 1809 was made by persons who had no right to grant it, and then *Nightingale* and *Perry*, in whose place the Plaintiff stood, were only tenants from year to year.

Here, therefore, we have a person who has enjoyed the land; whose predecessors have admitted the landlord's title; but who, when called upon to pay rent, says, "Because the landlord has put in evidence a deed which raises a doubt, but does not necessarily militate with a right to distrain, I ought to be exempted from the payment of rent." He cannot be permitted to exonerate himself by such an argument, and therefore the rule must be discharged.

PARK J. The argument at the bar turns on the fallacy of assuming that the rule of law which precludes a tenant from disputing his landlord's title, is an exception to the general principle, under which the actor in a cause is required to establish his claim; whereas it is itself a general rule, to which the cases cited, as *Rogers v. Pitcher*, *Fenner v. Duplock* and others, are cases of exception. In those cases, the title of the lessor had expired, and other persons were entitled to the rent. Here, the rent has been paid constantly to the same person, and no other has put in any claim. It is a bare case of a tenant who has paid rent to the only person who claims to be landlord. *Nightingale* and *Perry* never paid to any but the Defendant, and the Plaintiff stands in the same situation as *Nightingale* and

Perry. The Defendant introduced the deed of 1809 unnecessarily: he might have rested his case with the payments by *Nightingale* and *Perry*, and the assignments to the Plaintiff. Then, *Panton v. Jones* (a) is in point. There, the defendant had never paid rent personally to the plaintiff, and she did not give strict evidence of title; but it was proved, that in *January* 1811, the defendant being in possession of the premises, she distrained on his goods for 39*l.* 18*s.*, stated to be arrears of rent then due from him to her as his landlady. He did not replevy, and the goods were sold to satisfy the rent. It was contended on behalf of the Defendant, that payment under the distress was no acknowledgment of a tenancy by the party submitting to it. But *Bayley* J. said, "I have no doubt that submitting to a distress acknowledges the tenancy. The landlord, after distraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord."

Here there have been three distresses; one upon *Perry*, and two upon *Nightingale*, all in the name of *Blandy*, the Defendant. His title was never disputed by them, and there is no one to claim in opposition to it. The law and justice of the case coincide, and the rule must be discharged.

GASELEE J. The question is, whether or not the Plaintiff was tenant to the Defendant; and all the facts disclosed go to prove the affirmative. In 1827, it appears that *Blandy* was seised of the freehold of the premises in question, which before that time had been vested in the trustees under the marriage settlement of *Mr. and Mrs. Mansell*. He finds in occupation of the

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(a) 3 *Campb.* 372.

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premises, *Perry*, who is succeeded by *Nightingale*; they both pay the rent which is claimed as the Defendant's, and after so paying it upon distress, without objection, they would not be permitted to dispute his title. It is contended, however, that they occupied under a lease granted by Mr. and Mrs. *Mansell* in 1809, with which, although the lessors had not the legal estate in them, the trustees never interfered. But the Defendant is still entitled to the freehold under the conveyance of 1827; and the occupiers having admitted his title, while no other person has put in any claim, it is immaterial to the present decision, whether they occupied as tenants from year to year, or for a longer term. There is no reason for setting aside the verdict.

BOSANQUET J. I am of the same opinion. The Plaintiff is in the same situation as *Nelson*, who preceded *Nightingale* and *Perry*. The Defendant distrained on them, and his rent was paid subsequently to the distress: this amounts to an acknowledgment of a tenancy at the rent for which the distress was made;—whether for one or more years, it does not shew. As a general rule, it is not competent to a tenant, after submitting to a distress, or payment of rent, to dispute his landlord's title. There are exceptions, indeed, to that rule, but this case is not one of them. It is not the case where a paramount claim has been established; the landlord's title has not expired; nor has there been any payment by mistake. It is nothing more than the case of a tenant picking a hole in the title of a person to whom his predecessors have paid rent without objection. But it is said, that though a tenant cannot dispute his landlord's title, here the Defendant has himself shewn that the Plaintiff is not his tenant. It appears, however, that the lease unnecessarily disclosed, was one which the lessors had no legal title to grant; and rent having

been paid to the Defendant under a distress, it was not incompatible with that lease, that there might be a subsequent deed between the occupiers and the Defendant. But at all events the payment of rent under the distress establishes his title as landlord, and the liability of the parties distrained on, as tenants, holding the premises at the rent for which the distrainor avows. In such a case, according to *Panton v. Jones*, the estoppel is reciprocal. *Bayley J.* says, "I have no doubt that submitting to a distress acknowledges the tenancy: the landlord, after distraining, cannot bring an ejectment; and the occupier, if he does not replevy, I think, is precluded from denying the title of the landlord."

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Rule discharged (a).

(a) See *Fleming and Others v. Gooding*, 10 Bingh. 549.

IRVING v. CLEGG and Another.

May 31.

ASSUMPSIT on a charterparty, by which it was agreed that the ship *Eliza*, then lying at *Bristol*, and of the burthen of 323 tons or thereabouts, should take in and receive all such lawful goods as might be sent alongside, but not exceeding 300 tons of dead weight; and, being so loaded, should proceed therewith to *Batavia*, and there, or at *Sourabaya*, discharge the same; and being unloaded, should, at a port or ports in *Sumatra* or *Java*, both or either, load a full and complete cargo of merchandise, the fore-cabin, or Agreement to proceed to the *East Indies*, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton; 100 tons of rice or sugar to be shipped previous to any other part of the loading, to ballast the vessel: Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of rice or sugar, was at liberty to complete the cargo with light goods.

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10. Exch. 812.
6. 2*d.* 54.

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dining-room included to be filled with light goods, which the Defendants bound themselves to ship, not exceeding what the vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and being so loaded, should therewith proceed to *Deal* for orders, whether to discharge at *London*, *Rotterdam*, or *Antwerp*, or so near thereunto as she might safely get, and deliver the same on being paid freight for the outward cargo 300*l.*, and for the homeward cargo at and after the rate of 4*l.* 15*s.* per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton, nett weight at the king's beam, the tare of the sugar not to exceed 6 per cent.; and for all other goods, except those already mentioned, in just and fair proportion according to the *East India* Company's scale of tonnage; restraints of princes and rulers during the voyage always excepted. It was further agreed, that 100 tons of rice or sugar should be shipped previous to any other part of the loading, to ballast the vessel, and keep her in proper trim for the voyage; and that the Defendants should have permission to send a supercargo.

Breach, that Defendants did not, nor would, load or ship on board the said vessel a full and complete cargo of merchandise, according to the tenor and effect of the said charterparty and their said promise and undertaking, either at the said port called *Sourabaya*, or at any other port or ports in *Sumatra* or *Java*; but wholly refused and neglected so to do; and, on the contrary thereof, the Defendants loaded and shipped on board the said vessel a small and insufficient cargo, being less than a full and complete cargo by divers, to wit, 100 tons, and wholly neglected and refused to make up the deficiency in the said cargo, or to ship any more merchandise on board the said vessel, either at the said port called *Sourabaya*, or at any other port or ports in *Sumatra* or *Java*: by means whereof the Plaintiff lost

and was deprived of a large sum of money, to wit, the sum of 500*l.*, for freight, which might, and otherwise would, have accrued to the Plaintiff, if the Defendants had loaded on board the said ship such a cargo as they ought to have loaded according to the terms of the said charterparty.

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Upon this charterparty it was contended at the trial, that the Defendants should have shipped a full cargo, so assorted and so complete as to render it unnecessary for the Plaintiff to ship any ballast. It was proved, however, that, though the ship was fully loaded, the Defendants had stowed such a proportion of pepper as to render it necessary for the master to ship thirty-six tons of stone ballast for the safety of the vessel, in addition to the 100 tons of rice.

A verdict having been obtained by the Plaintiff for 130*l.* 4*s.* 8*d.* on a count for demurrage,

Wilde Serjt., pursuant to leave given at the trial, moved to increase the damages by the sum of 380*l.* freight for the thirty-six tons thus devoted to ballast, as he contended, by the default of the Defendants. He referred to *Wallace v. Small (a)*, where, under a covenant to ship a full and complete cargo in the usual and customary manner, the defendant loaded a full cargo, but with such a proportion of heavy goods that the ship was improperly burthened beyond her tonnage; and Lord *Tenterden* C. J. having left it to the jury to say whether such a mode of loading was permissible, the jury gave damages for the excess.

A rule *nisi* having been granted,

Spankie and *Coleridge* Serjts. shewed cause. Under the terms of this charterparty, the Defendants had a right to load goods of whatever description they pleased,

(a) 1 *M. & M.* 446. (not reported as to this point).

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provided they shipped 100 tons of rice or sugar previous to any other part of the lading. If it were not intended that the Defendants should have this option, it had been unnecessary to enumerate the rate of freight for the coffee, rice, pepper, and other goods: it had been sufficient to require that the Plaintiff should have so much freight for the entire ship. In *Wallace v. Small*, the ship was to be loaded in the manner usual and customary at the port of *Calcutta*. So in *Benson v. Schnieder(a)*, the ship was to have a full cargo of cotton pressed according to the practice. Here, no usage of loading has been referred to, either in the charterparty or on evidence. *Hunter v. Fry(b)* only decided that where a ship is to have a full cargo, the question of fullness is not to be determined by a loose recital in the charterparty, which describes her to be of a certain number of tons, or *thereabouts*. But in *Moorsom v. Page(c)*, where, by a charterparty, the freighter covenanted to provide for the ship a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid, it was held, that, having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although, for the want of it, the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done.

To the same effect is *Abbott on Shipping*, 287. *Roccus de navibus et naulo*, (notes,) p. 72. to 75.

Wilde and Talfourd Serjts. in support of the rule. It may be collected from this charterparty, that the intention of the parties was that the ship should be made available to the extent of her burthen, to earn freight. And this especially appears from the stipulation that the

(a) 7 Taunt. 272.

(b) 2 B. & Ald. 421.

(c) 4 Campb. 103.

Defendants should first put in 100 tons of rice or sugar to supersede the necessity of ballast, and that the fore-cabin should be filled with light goods. The stipulation as to the early shipping of rice or sugar would have been unnecessary, if the owner was to renounce any portion of freight for the stowage of ballast. In *Moorsom v. Page* there was no such stipulation that the freighter should supply the place of ballast by goods of a certain description.

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Cur. adv. vult.

TINDAL C. J. The question whether the *Eliza* has been loaded with a full and complete cargo upon her homeward voyage, appears to us to depend upon the construction which is to be put upon the terms of the charterparty itself; for as to any customary mode of loading upon the voyage described in the charterparty, none such is either referred to by the charter, nor is any such found by the jury.

Now, looking to the terms of the charterparty alone, it appears to us, that if it had not been for the insertion of the stipulation at the end, this case would have been governed by the decision in *Moorsom v. Page* (a); and that it would have been clear that, under the agreement by the freighter to furnish a full and complete cargo of merchandise, with the subsequent enumeration of the rate of freight for sugar, coffee, rice, pepper, "and all other goods," the freighter would be at liberty to load the ship with whatever goods and in whatever proportion he thought proper; and that the loss of freight, if any loss arose from the necessity of putting ballast into the ship, would be a loss that must fall on the owner.

But the question arises upon the stipulation at the end of the charterparty, by which the merchant undertakes to ship 100 tons of rice or sugar previous to any

(a) 4 Campb. 108.

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other part of the lading; "to ballast the vessel, and keep her in proper trim for the voyage." And the question is, whether, under this stipulation, the freighter is bound to make up a full cargo of other articles in such proportions that freight shall be payable for the whole tonnage of the ship; or whether he may load a full cargo of the lightest commodities, and if any ballast is then wanting, it must be put in by the master, and occasion, *pro tanto*, a loss of freight. And we think the latter is the true construction of the agreement. In the first place, it is consistent with the very terms employed by the parties; and it is some violence to those terms, to hold them to extend to 136 tons, or to any other quantity that might be found necessary to ballast the ship. If the parties had intended so uncertain a quantity, we think they might have expressed themselves to that effect. In the next place, it is the duty of the owner to find proper ballast for the ship, in order to make her trim for her voyage; the agreement in question, therefore, is an agreement made for the benefit of the owner, as it relieves him from so much of the obligation as is usually thrown upon him, and ensures him a freight for what would otherwise be unproductive. But it leaves the owner still liable to that obligation, except so far as the special agreement will extend, which here, by the very terms of it, is to 100 tons only.

We therefore think, that for any ballast that was necessary beyond this, the owner is bound to supply it; and that the freighter has not stipulated in any way that he will pay freight for the tonnage of such additional ballast; or, in other words, that he was at liberty to select a full and complete cargo out of such articles as he pleased, after first putting the 100 tons of rice for ballast.

Rule for increasing the damages discharged.

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MEEKIN v. WHALLEY.

June 2.

THE Defendant, being sued for a debt due from him to the Plaintiff, paid the debt to *Pasman*, who acted as the Plaintiff's attorney, as soon as the writ was served, but refused to pay the costs.

The attorney proceeded with the action, in order to recover the costs; but at the trial of the cause, the Defendant apprised *Pasman* that the payment of costs was resisted because he was not in a capacity to act, having omitted to enrol himself as an attorney of the Court of Common Pleas, or to take out his certificate for the year in which the action was commenced.

Pasman had been admitted before the secondary, but had never taken the parchment instrument of admission to the clerk of the warrants; and his name was not found in the book kept by that officer, and containing a list of the attornies who are duly admitted.

He had taken out a certificate on the 15th of *January* 1833, but none subsequently, till *March* 1834. The certificate of *January* 1833, according to 37 G. 3. c. 90. s. 26. 28., expired on the 1st of *November* 1833, and this action was commenced in the *December* of that year.

A verdict having been taken for the Plaintiff, and execution having issued,

Wilde Serjt., upon affidavit of the foregoing facts, obtained a rule *nisi* to stay the proceedings, on the ground that this execution was sued out for costs, and that *Pasman*, not being qualified to act as an attorney, was not entitled to receive costs. By the 37 G. 3. c. 90. s. 31., it is enacted, that "any person admitted, sworn, and enrolled in any of the said Courts as therein men-

Defendant, on being sued, paid the debt, but refused to pay costs; Plaintiff's attorney proceeded to trial and issued execution for them; but being uncertificated, and the Plaintiff having made him no advances, the Court stayed the proceedings.

1834. tioned, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said Courts, by virtue of such admission, entry, and enrolment; and the admission, entry, and enrolment of such person, in any of the said Courts, shall be from thenceforth null and void."

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Talfourd Serjt., who shewed cause, after citing and distinguishing *Vincent v. Holt* (a), *Paterson v. Powell* (b), and *Latham v. Hyde* (c), relied on *Reeder v. Bloom* (d), as expressly in point. There it was held, that the circumstance that the plaintiff's cause had been conducted by one who was not an attorney, did not deprive the plaintiff of his right to full costs against the defendant.

He contended, also, that an application to the discretion of the Court was too late, after execution issued; and that *Pasman* was not the attorney on record.

Wilde relied on *Paterson v. Powell*, where a cause in this Court had been tried, and a verdict found for the plaintiff, which was afterwards set aside, on the ground that the contract upon which the plaintiff sued was illegal and void. After the rule for a new trial was made absolute, it appeared that the defence had been conducted by an attorney of the Court of *King's Bench*, acting in the name of one who had for some years ceased to be an attorney of this Court. And the plaintiff was permitted to discontinue without payment of costs, except as to so much money as might be found to have been paid by the defendant to his attorney on account of the suit. In *Reeder v. Bloom*, the Court assumed the plaintiff to have paid money in advance to

(a) 4 *Taunt.* 452.

(b) 3 *M. & Scott.* 195.

(c) 1 *Cr. & Mee.* 128.

(d) 3 *Bingh.* 9.

the person who acted as his attorney; no advance had been made in the present case; the Plaintiff had been paid his debt; and the person who assumed to act as his attorney was proceeding for costs which, not being an attorney, he was not entitled to receive. *Reeder v. Bloom* was doubted in *Young v. Dowlman (a)*.

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TINDAL C. J. We may decide this question without touching in any way the authority of *Reeder v. Bloom*. There, the cause went on for the benefit of the client. Here, after the payment of the debt by the Defendant, the cause proceeded solely for the benefit of the person who had acted as the Plaintiff's attorney; but who, when he sued out the writ, had neither been enrolled as an attorney of this Court, nor had he taken out his certificate for the year in which the suit was commenced and carried on. Those omissions were matters within his own knowledge, as was the payment of the debt by the Defendant. We think, therefore, that this is a case in which, applying our discretion in the construction of the statute 37 G. 3., we ought not to allow the Defendant to pay costs.

PARK J. I think, on the ground pointed out by the Chief Justice, this case is distinguishable from *Reeder v. Bloom*, — a decision which I should regret to see reversed.

GASELEE J. This case is distinguishable from *Reeder v. Bloom*, in the circumstance that the debt was paid to the Plaintiff, and that the action was continued only to recover costs for one who was not entitled to receive them as an attorney.

As the clerk of the warrants has no means of knowing

(a) 3 *Younge & Jer.* 24.

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when an attorney is admitted, I think it the duty of the attorney to take the admission parchment to the clerk of the warrants; and that the attorney is not enrolled till his name is entered in that officer's book. It is not necessary, however, to decide that point, because *Pasman* was also unprovided with the certificate required by 37 G. 3. c. 90.

BOSANQUET J. I am of the same opinion. It is not necessary to touch *Reeder v. Bloom*; because here, the action having been proceeded with solely for the benefit of the party who acted as the Plaintiff's attorney, in order to obtain the benefit sought, he ought, at least, to shew that he is an attorney.

Rule absolute.

June 5.

HUMPHREYS V. HARVEY.

The book of the clerk of the warrants

is the proper place of enrolment for the name of an attorney of the *Common Pleas*.

It is the duty of the attorney to cause his name to be enrolled; and if he omits to do so, he is incompetent to

obtain costs, though otherwise duly qualified as an attorney.

IN this case, after a verdict had been found for the Defendant,

Wilde Serjt. obtained a rule *nisi* to stay proceedings without payment of costs to the Defendant or his attorney, on the ground that the Defendant's attorney had never been duly enrolled an attorney of this Court. As to which, the facts were, that he had signed the roll on which attorneys enter their names when they are sworn in Court, and also the parchment instrument by which a Judge authorised his admission; but he had never taken this instrument to the clerk of the warrants, in order to his name being enrolled in that officer's

book. He had duly taken out his certificate, and enrolled his articles, as required by 34 G. 3. c. 14. s. 2.

It was admitted that the client had advanced no money to his attorney on account of expenses in this cause.

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Robinson shewed cause, on an affidavit that when the attorney signed the roll in Court, upon being sworn in, he was told by the officer in attendance that his admission was complete, and that deponent was ignorant of the usage, if any, to enrol admissions with the clerk of the warrants. Also, that he was duly enrolled an attorney of the Court of King's Bench. *Robinson* relied, first, on *Reeder v. Bloom* (a), and — *v. Sexton* (b); but, being apprised by the Court of their recent decision in *Meekin v. Whalley* (c), contended that the Defendant's attorney had done all that was necessary to entitle him to practise, and that it was the duty of the clerk of the warrants to make out his roll of attornies from the roll signed by those who are sworn in Court, and not the duty of the attorney to take the parchment instrument of admission to the clerk of the warrants, who receives no fee for entering an attorney's name in his book. By 2 G. 2. c. 23. s. 6., it is enacted, "That the Judges of the said Courts respectively, or any one or more of them, shall, and they are hereby authorised and required, before they shall admit such person to take the said oath, to examine and enquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and if such Judge or Judges respectively shall be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said Judge or Judges of the said Court respectively shall, and they

(a) 3 Bingham. 9.

(c) *Ante*, p. 59.

(b) 1 Dowling. Pr. Cas. 180.

1854. are hereby authorised to administer, in open Court, to
 HUMPHREYS such person, the oath hereinafter directed to be taken by
 v. attornies; and after such oath taken, to cause him to
 HARVEY. be admitted an attorney in such Court, and his name to
 be enrolled as an attorney in such Court, without any
 fee or reward."

The words, "the Judges are to cause his name to be enrolled," casts the duty on the Court, and not on the attorney. It would be a great hardship to deprive the Defendant of his costs for the omission of a formality, of the necessity of which he could have had no intimation. [*Tindal* C. J. As the Defendant never can be liable for costs to his attorney, if not duly admitted, why is the Plaintiff to pay them?] It would be still harder to cast on the attorney the expenses incurred for his client in the progress of the suit, because his name is omitted in the officer's book, when the roll signed by attornies at the time they are sworn shews he has been duly admitted. And no inconvenience can have been occasioned, because, by rule of the Court of King's Bench, *Hilary*, 8 G. 3., every attorney residing in *London* and *Westminster* is obliged to enter his address in a book in the Master's office. The Defendant's attorney has been duly admitted in the Court of King's Bench; and by 34 G. 3. c. 14., a party admitted in one Court, may practise in other Courts without paying additional duty. In that act the word *enrolled* does not occur.

Wilde, in support of his rule, contended that the book of the clerk of the warrants was the only place of enrolment under the statute; and as that officer could have no means of knowing the address of a person lately admitted, it must be the duty of such person to take his admission to the clerk of the warrants. By the statute (2 G. 2. c. 23. s. 5.), "No person shall be per-

mitted to act as an attorney or to sue out any writ or process, or commence, carry on, or defend, any action or actions, unless such person shall be examined, sworn, admitted, and enrolled, in manner therein mentioned; and in case any person shall sue out any writ or process, &c., as an attorney, for, or in expectation of gain, fee, or reward, without being admitted and enrolled, every such person is thereby made incapable to maintain any action for any fee, reward, or disbursement on account of such proceeding." So that the attorney, even if he had made disbursements, could not recover them at the hands of the Defendant. The Plaintiff, therefore, cannot be called on to pay them.

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TINDAL C. J. It is with some regret in the particular case that I come to the determination which the language of the act compels. The question is, whether, when an attorney has not been duly enrolled, and that fact is brought to our knowledge, we can assist him to recover costs against an adverse party, for which costs he could not maintain an action against his own client. And I am of opinion we cannot. It might perhaps be a hardship, if the Court could not so far exercise a discretion in the matter, as to cover advances made by the client in the course of the cause, and *Reeder v. Bloom* proceeded on the general assumption, that in the course of a cause money usually passes from the client to his attorney. The authority of that case, if it be attempted to push it further, is weakened by the decision in *Young v. Dowlman (a)*; and that brings us to the question in this cause, whether the enrolment of the attorney be a condition precedent to his recovering costs. It has been provided that an attorney, duly admitted of one Court, may be admitted to another,

(a) 3 *Younge & Jer.* 24.

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without the payment of any additional duty; 34 G. 3. c. 14.; but that brings us back to the question, what is a due admission? and we cannot hold that the omission of the word *enrolled* in the statute 34 G. 3. c. 14. is a repeal of the express enactment of the 2 G. 2. c. 23. s. 5., by which it is enacted that, "no person shall be permitted to act as an attorney, or to sue out a writ, or process, or to commence, carry on, or defend any action or actions, or any proceedings, either before or after judgment obtained, in the name or names of any other person or persons, in his Majesty's Court of King's Bench," unless such persons shall have been "*examined, sworn, admitted, and enrolled*, in manner therein mentioned."

Sect. 13. prescribes the form of oath to be taken; sect. 18. the place of enrolment; and sect. 24. recapitulates, "that in case any person shall in his own name, or in the name of any other person, sue out any writ or process, &c., as an attorney or solicitor, for or in expectation of any gain, fee, or reward, without being admitted and enrolled as aforesaid, every such person, for every such offence, shall forfeit and pay 50*l.* to the use of the person who shall prosecute him for the said offence; and is hereby made incapable to maintain or prosecute any action or suit, in any court of law or equity, for any fee, reward, or disbursements, on account of prosecuting, carrying on, or defending, any such action, suit, or proceeding."

When, therefore, it is brought to the knowledge of the Court, that the attorney has not been duly enrolled, and our interference will not be prejudicial to the client, we cannot allow his attorney to continue proceedings in order to the recovery of costs, in a case where the attorney could not recover them against his own client.

PARK J. I come to the same conclusion with regret, in this particular case, because it is probable that when

the attorney signed the oath roll upon being sworn in this Court, he thought he was thereby enrolled an attorney. But that roll is not, strictly speaking, the roll of attorneys. The enrolment required by the statute was formerly entered on rolls of parchment, and now, in a book, alphabetically, by the clerk of the warrants. If there were no such document to refer to, how could the Court, when called on, strike an attorney off the roll? Looking, therefore, to the words of the statute, and distinguishing between the oath roll, and the enrolment by the clerk of the warrants, I think we must make this rule absolute. *Reeder v. Bloom* passed on the notion that money is always advanced by a client to his attorney in the progress of a cause; there were no facts incompatible with that assumption of the Court; and *Patteson J.* in *Young v. Dowlman* puts the case upon that footing. *Young v. Dowlman* is decisive in the present case.

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GASELEE J. The roll signed by the attorney in Court, upon being admitted, is a roll containing merely the names of those who are sworn, without their address. The parchment instrument of admission signed by the Judge, contains the attorney's address; and that instrument he ought to take to the clerk of the warrants, and have his name and address enrolled, pursuant to the statute, in that officer's book.

BOSANQUET J. The attorney for the Defendant not having been enrolled in the manner required by law, was not authorised to practise as an attorney, and could not have recovered from his client any fees or disbursements. Costs when recovered are paid for the benefit of the suitor, and the Court will not enforce the payment by the opposite party where the suitor has not incurred any expense or liability. *Reeder v. Bloom*

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passed on the ground of an assumed advance by the client to his attorney. And in *Young v. Dowlman*, where it appeared that there had been no such advance, the Court refused to enforce the payment of costs by the adverse party. That is a sound principle in the construction of this statute, and to that principle we must adhere.

Rule discharged.

June 2.

FURNIVAL v. STRINGER.

Where, by consent of both parties, the venue was laid in *L.*: Held, that no objection could afterwards be taken to the venue, notwithstanding it ought, under an act of parliament, to have been laid in *S.*

THIS was an action on the case against the sheriff of *Surrey* for treating the Plaintiff, a prisoner for debt in *Horsemonger Lane* gaol, with unnecessary rigor, and shutting him up on the felon's side.

The venue was laid in *London*.

A verdict having been found for the Defendant,

Wilde Serjt. obtained a rule *nisi* to set it aside, as contrary to evidence.

Spankie Serjt. and *Thesiger* opposed the rule, on the ground, among other objections, that the Defendant was entitled to the protection afforded by 4 G. 4. c. 64. ss. 10. 75.; and, if so, the Plaintiff ought, at all events, to be nonsuited for having laid his venue in *London* instead of *Surrey*, the county in which *Horsemonger Lane* gaol is situate.

It appeared, however, that the venue had been changed from *London* to *Surrey* by the Defendant; that the Plaintiff afterwards obtained a rule to take it back to *London*, on the ground that the Defendant, as sheriff

S. R. C. P. 636.

of *Surrey*, was connected with the magistrates and jury of that county; and that this rule was made absolute, the Defendant not having opposed it.

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The Court held that the trial had taken place in *London* by mutual consent; and that the Defendant was, therefore, precluded from taking the objection.

Spankie argued that the statute was imperative.

Sed per Curiam. Consensus tollit errorem.

Rule absolute.

EICKE v. NOKES.

June 3.

THE Plaintiff, having been nonsuited, moved for a new trial; but his rule was discharged in this term.

Plaintiff being liable to Defendant for the costs of a nonsuit, issued a *fiat* of bankruptcy against the Defendant. The Court refused to stay Defendant's proceedings in the action.

Curwood now moved to stay proceedings, on the ground that, two days before the Plaintiff moved for the new trial, he had sued out a *fiat* of bankruptcy against the Defendant; and the statute 6 G. 4. c. 16. s. 59. enacts, that no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be

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in prison or custody at the suit of, or detained by, such creditor, he shall not prove or claim as aforesaid without giving a sufficient authority in writing for the discharge of such bankrupt; that the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed; provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him. [*Tindal* C. J. The election is a discontinuance as against the creditor; but he has no right to avail himself of his own act to avoid payment of costs. If he had moved to discontinue, he could only have done so on payment of costs.] The language of the statute is general, and makes no distinction.

TINDAL C. J. All that the clause directs is, that "the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed, provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him." That evidently points to a commission by some other person, and does not apply to a case where the Plaintiff himself is the person who sues out the commission. It would be neither within the words nor the spirit of the act to stay these proceedings.

Rule refused.

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PEPPER v. WHALLEY.

June 3.

WILDE Serjt. obtained a rule *nisi* to set aside the declaration and subsequent proceedings in this cause for irregularity, the names of two Defendants having been inserted in the writ of summons, and separate proceedings having been taken against each. "Every writ of summons, capias, and detainer, shall contain the names of all the Defendants, if more than one, in the action, and shall not contain the name or names of any Defendant or Defendants, in more actions than one." *R. M. 3 W. 4.*

The names of two Defendants having been inserted in the writ of summons, separate proceedings were taken against each: Held, irregular.

Talfourd Serjt. who shewed cause, said, that though there were two names in each writ, there were also two writs, and that the Defendants had waived the irregularity by entering separate appearances.

Wilde. The irregularity pointed out is subsequent to appearance. And,

Per Curiam; It cannot be got over.

Rule absolute.

11 WIA 349

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June 3. BUSH v. PARKER, THOMAS and JOHN POWELL,
and KEARSLAKE.

The Plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and there imprisoning him. Plea, justifying the assaulting, seizing, and laying hold of the Plaintiff, and pulling and dragging him about:

Held, no sufficient answer to the entire charge in the declaration.

TRESPASS, for assaulting the Plaintiff, seizing and laying hold of him, pulling and dragging him about, striking him many violent blows, forcing him out of a certain field into and through a pond, and there imprisoning him.

Second count for assault and imprisonment.

The Defendants pleaded, first, not guilty; and then, as assistants of *John Powell*, justified the assaulting, seizing, and laying hold of the Plaintiff, and a little pulling and dragging him about, on the ground that the Plaintiff was unlawfully in a close of *John Powell's*, and refused to go out when civilly requested.

The jury having found *Parker* and *John Powell* guilty on the general issue, with 5*l.* damages, and having found a verdict for the Defendants on the residue of the record,

Ludlow Serjt. moved to enter up judgment for *Parker* and *Powell*, notwithstanding the verdict against them on the general issue, on the ground that the dragging through the pond, which was not adverted to in the pleas of justification, was only matter of aggravation; the gist of the action being the assault and battery, which were covered by the pleas of justification. In *Taylor v. Cole* (a), where the action was for entering the plaintiff's house and turning him out, *Buller J.* said, "The first count is for breaking, entering, and expelling; the plea only justifies the breaking and enter-

(a) 3 T. R. 297.

12 Clark & Fin 706
8. Exch. 538.
5 ER. 21. 141.

ing, shewing a good cause for it; and that is a full answer to the first count; for the breaking and entering are the gist of action, and the expulsion is only matter of aggravation. If the plaintiff had wished to take advantage of the expulsion, he should have shewn the special matter in a new assignment." And *Dye v. Leatherdale* (a), *Gates v. Bayley* (b), and *Fisherwood v. Cannon* (c), establish that position. In *Stammers v. Yearsley* (d), the gist of the action was the disgrace incurred by the plaintiff in consequence of his being imprisoned on a charge of assault with intent to commit a felony; and it was rightly held, that a plea justifying the imprisonment on a charge of mere assault, was no answer to the action. Here the Defendants were justified in forcing the Plaintiff out of their employer's field by the nearest way; and whether that way led them through a pond or a hedge was immaterial. If it were material, the Plaintiff should have new assigned: *Cheasley v. Barnes*. (e)

A rule *nisi* having been granted,

Wilde Serjt. shewed cause.

The Defendants having pleaded not guilty to the whole declaration, and having omitted to justify the dragging through the pond, it was unnecessary for the Plaintiff to new assign; *Cheasley v. Barnes*, therefore, does not apply: and the dragging through the pond was parcel of the gist of the action. It was an act which the Defendants could not avow without alleging and proving facts in justification, and no such facts appear on these pleadings. For though the Defendants had a right to expel the Plaintiff from their employer's field, and to use the force necessary for that purpose, they

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(a) 3 *Wils.* 20.(d) 10 *Bingh.* 35.(b) 2 *Wils.* 313.(e) 10 *East.* 73.(c) 3 *T. R.* 297. (cited).

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had no right, when he was out of the field, to proceed to corporal infliction. That infliction is a serious ground of action, independently of the expulsion. In *Taylor v. Cole*, the expulsion of the plaintiff was no ground of action, independently of the trespass by entering his house; for the only question to be decided there was, whether the lessee of a term might quietly enter. But in *Phillips v. Howgate (a)*, where, in trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about; justification, that defendant arrested plaintiff under process of court; and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c.; it was held, that that latter part of the justification not being proved, the plaintiff was entitled to judgment; and that it was not necessary to new assign the battery by the defendant. It was held also, that the second count of the declaration (which omitted the battery), having been justified by proof of the writ and warrant, and arrest under them, the plaintiff, although one assault only was proved, was still entitled to judgment, having proved the trespasses as laid in the first count.

Ludlow and Talfourd Serjt. contra.

In *Phillips v. Howgate*, the plea of justification was such as to preclude the plaintiff from a new assignment; for the defendant alleged in justification of his battery, an attack by the plaintiff which never took place. Here, if the dragging through the pond were a corporal infliction unnecessary for the Defendant's purpose of extruding the Plaintiff, he ought to have new assigned the extra violence. But for aught that appears to the con-

(a) 5 B. & Ald. 220.

trary, the pond was parcel of the close, and the only direction by which it might be possible to expel the Plaintiff. He might have refused to mount a stile. The gist of the action was the expulsion from the field. The track by which the Plaintiff was driven, was immaterial. *Taylor v. Cole*, therefore, is in point. In 1 *Wms. Saunders*, 28. note 3., it is laid down, "If a plea begin only as an answer to *part*, and is in truth an answer to *part*, or though in law it is an answer to the whole, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*. But this rule must be understood with this limitation, that the part of the declaration, which is not answered by the plea, is material, and the gist of the action; for, where any thing is inserted in the declaration as *matter of aggravation*, the plea need not answer or justify *that*, for the answering of that which is the gist of the action will cover the whole declaration." Accordingly, in *Montprivatt v. Smith (a)*, where to trespass for breaking and entering a house, and staying therein three weeks, the defendant pleaded a justification as to breaking and entering, and staying in the house twenty-four hours, under a writ of *fi. fa.*, it was held that the plea covered the whole declaration.

And in *Lambert v. Hodgson (b)*, where the declaration was of two counts, for assault and imprisonment; plea, that defendant being bail for plaintiff, arrested him to render him in discharge, and detained him till he had satisfied the demand in the action: replication, *de injuria*: it appeared that defendant, in addition to detaining plaintiff till he satisfied the demand in the action, detained him an hour longer, till he paid the expenses of the defendant's becoming bail, &c. It was held, that that was one continuing trespass; and that, therefore, in

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(a) 2 *Campb.* 175.(b) 1 *Bingh.* 317.

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order to recover for that part of it which was unjustifiable, namely, the additional detention for the bail expenses, the plaintiff ought to have newly assigned. *Dale v. Wood* (a) is to the same effect.

TINDAL C. J. I agree in the rule of law as laid down by the counsel for the Defendants, that where in trespass, a defendant pleads a justification, going to the gist of the action, it is not necessary to include that which is mere matter of aggravation. But that brings us to the application of the rule, and to the enquiry whether it will serve the Defendants or not. And we have only to look to the pleadings here, and to apply our common sense to the allegation that the Defendants dragged the Plaintiff through a pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the Plaintiff first complains. He alleges that the Defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field, into and through a pond, and there imprisoned him. It does not appear where the pond was, whether in the field or not. However, waiving that, how much do the Defendants justify? The assaulting, seizing, and laying hold of the Plaintiff, and a little pulling and dragging him about: altogether omitting to notice the allegation in the declaration, that the Plaintiff was forced through a pond. The question is, whether this was a separate and distinct trespass, or a mere aggravation of the original assault; and it is plain that this was one link in a chain of trespasses following each other, and not a mere aggravation of the first assault. If that assault were alone the gist of the action, and justifying the gist were to be considered a justification of all that followed,

we might suppose a case in which, after the assault, the assailant might throw his adversary over a precipice and break his arm. Would that, which stands on such distinct grounds, be justified by any answer to the assault? From one assault to another it might proceed to a contest in which the life of the Plaintiff might be at stake. In like manner, as the outrage in question is no part of the trespass included in the justification, and would have required a distinct statement of facts to justify it, it is not covered by the Defendants' plea. The case relied on for them is *Taylor v. Cole*. There, the plaintiff declared in trespass against the defendant, for breaking and entering the plaintiff's house and expelling him therefrom; the defendant, in one plea, justified the entry under a writ of *fi. fa.*, and in another plea, the expulsion, under a sale of the plaintiff's leasehold interest in the premises by virtue of the *fi. fa.*; and the Court held, that the breaking and entering were the gist of the action, and that the expulsion was only matter of aggravation. But I beg to call attention to the way in which that point was treated in the court of error. That court distinguishing as to the case in which expulsion might or might not be a substantive trespass,

Lord *Loughborough* says, "It is not necessary to consider in what cases expulsion may be a substantive trespass. Undoubtedly to enter into a house, and to expel the possessor, may be distinct acts, and they may be also connected. But when the plaintiff charges them as parts of one trespass, as is the case in this declaration, and the defendant sets forth a justification to the principal act, the entry, it is just that the plaintiff should, either by replication or new assignment, state that he insists on the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not, it is just to consider it only as matter of aggravation. The plaintiff complains that the defendant broke and

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entered his house and expelled him : the defendant shews a justification of the entry: if the expulsion makes him a trespasser *ab initio*, it takes away his justification, and therefore should be replied." (a)

Here, the dragging through the pond is not a trespass existing at the same time, but succeeding those trespasses in the declaration, which the Defendant justifies. It is one of a chain of trespasses, which is not justified by merely justifying that which preceded it. *Phillips v. Howgate* goes the full length of this proposition; and, although the converse of it, proves the principle. There, in trespass, the first count of the declaration stated, that defendant assaulted and imprisoned plaintiff, and during such imprisonment, struck, pulled, and pushed him about : justification, that defendant arrested plaintiff under process of court, and that plaintiff, whilst in custody, having conducted himself in a violent manner, defendant necessarily, and to prevent his escape, struck, &c. The defendant failed in proving that the plaintiff, while in custody, conducted himself so violently as to render it necessary the defendant should strike him to prevent his escape, and then said, "let me get out of my difficulty by saying it was a mere aggravation of the original trespass." But the Court said, no. The circumstance of the defendant having put matter into his justification, of which no proof had been given, would not, of itself, vitiate the justification. But the proof given was not sufficient to justify the trespass in pushing and striking the plaintiff. In order to justify that, it was necessary to prove that part of the defendant's justification in which he stated that the plaintiff resisted when in custody. That not being done, the Court thought the justification was not proved, and that the plaintiff would be entitled to a verdict. That case is in point; and, therefore, the present rule must be discharged.

(a) 1 H. Bl. 561.

PARK J. I am of the same opinion. The whole point is, whether this is a distinct trespass or an aggravation of the first assault. It is clear that, upon the declaration, the charge of dragging through the pond is a distinct and substantive offence. And I think that, upon this record, it appears that the pond was not part of the field from which the Plaintiff was expelled; for the declaration alleges that the Defendants assaulted, seized, and laid hold of him, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him. Having got the Plaintiff out of the field, the Defendants have shewn no reason for getting him into the pond. That was a substantive trespass, for which the Plaintiff is entitled to retain his verdict.

GASLEE J. I am also of opinion that this was a substantive trespass, and is not covered by the plea. If, in such cases, we were to say that the whole is one transaction, and covered by a plea justifying a single assault, much would remain unanswered. Suppose a case of assault, and dragging the party assaulted, in handcuffs, through the streets to a place of confinement: could a defendant justify that by pleading that he arrested the party for a debt? *Stammers v. Yearsley* is much like the present case. There, the plaintiff complained of assault and battery, of being taken in custody along the streets, and of being imprisoned on a charge of assault with intent to commit a felony: defendant pleaded, that plaintiff having assaulted him, defendant gave plaintiff in charge of a peace officer, who laid hands on him and took him before a justice. At the trial, although one assault only was proved, the facts pleaded were held to be an insufficient answer to the facts declared on.

Here, the declaration alleges, that the Defendants

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PARKER. assaulted, seized, and laid hold of the Plaintiff, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him. And it is impossible to consider that as merely an aggravation of the first trespass.

BOSANQUET J. I am of the same opinion. The question is, whether this is part of the manner in which the trespass was committed, or, in itself, a separate trespass. The declaration states, that the Defendants assaulted, seized, and laid hold of the Plaintiff, pulled and dragged him about, struck him many violent blows, forced him out of a certain field into and through a pond, and there imprisoned him.

The Defendants profess to justify the assault, battery, and pulling and dragging about; and then contend, because they have justified that, that the dragging through the pond is only part of the manner in which the trespass was committed. That is not a reasonable construction of the declaration. The Defendants have pointed their justification to the battery only, leaving the affair of the pond unanswered; and, as that was also a substantive trespass, the Plaintiff ought to retain his verdict.

Rule discharged.

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NIBLETT and Others v. POTTOW.

June 4.

ASSUMPSIT for money had and received by the Defendant to the use of the Plaintiffs. The Defendant pleaded the general issue, upon which issue was joined; and the following facts were stated by consent of the parties, and by order of one of the Judges, for the opinion of this Court, according to the statute in such case made and provided.

By an act of 39 G. 3. c. 49., entitled "An Act for more effectually repairing, widening, altering, and improving the Road at or near *Beckhampton*, &c. in the County of *Wills*," it was enacted, "That the respective tolls following should be demanded and taken at every turnpike gate of the person or persons attending any cattle or carriage, before any such cattle or carriage should be permitted to pass through the same, that is to say, for every *horse*, mare, gelding, mule, or other cattle *drawing any coach*, or other such carriage, the sum of *three pence*. For every horse, mare, gelding, mule, or other beast or cattle *drawing any waggon*, wain, cart, or other such carriage, the sum of *4d.* For every horse, mare, gelding, mule, or ass, laden or unladen, and *not drawing*, the sum of *1d.* And if any person or persons subject to the payment of any of the said tolls should, after demand thereof made, neglect or refuse to pay the same or any part thereof, it should be lawful for the person or persons appointed to collect the tolls to seize and distrain any horse or horses or other cattle, together with their bridles, saddles, gears, harness, or accoutrements, or their loading, or to stop, horse passing a second time the same day, with a different carriage and different passengers, was exempt from toll.

By a local act a toll was imposed on horses *drawing carriages*; for default of payment the collector was authorised to distrain any horse or carriage upon which toll was imposed by that act. No person was to pay more than once a day in respect of any carriage or any horse, and no toll was to be taken in respect of any carriage, horse, or beast conveying materials for the road: Held, that the toll was imposed on the horse only, and not on the combination of carriage and horse; and that the same

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seize, and distrain any *carriage*, with its loading, *upon which toll was by that act imposed*. And it was further enacted, "That no person should be subjected or liable to pay any of the tolls thereby granted, more than once in any one day, to be computed from twelve o'clock at night to twelve o'clock at the succeeding night, within each district, for or in respect of any *carriage or any horse*, mare, gelding, or other cattle passing through all or any turnpike or turnpikes continued or erected by virtue of that act within that district, such person producing a ticket denoting that the respective tolls had been paid on that day; which tickets the collectors of the tolls were thereby required to deliver gratis on receipt of such tolls."

By an act of 58 G. 3. c. 82., entitled "An Act to continue the Term and enlarge the Powers of an Act of his present Majesty, for repairing the Road at or near *Beckhampton*, &c., in the County of *Wilts*," reciting, that it was expedient that the tolls granted by that act should be increased, it was therefore enacted, "that the said recited act of 39 G. 3., and the several powers, provisions, matters, and things therein contained, except such as are hereby varied, altered, or repealed, shall be and continue in full force and effect, and be exercised for and during the term hereinafter mentioned, in like manner and as fully and effectually to all intents and purposes as if the same were repeated and re-enacted in the body of this act, but subject, nevertheless, to the amendments, variations, alterations, and additions in this act contained." By section 4., reciting that the tolls granted by the said act of 39 G. 3. had been found insufficient for the purposes therein mentioned, it was enacted, "that from and after the 13th day of *December* then next, the said tolls should be, and the same were thereby repealed, and that instead thereof there should be demanded and

taken for every *horse* or other beast *drawing any waggon*, cart, or other such carriage, the sum of 6*d.*; for every *horse* or other beast *drawing any coach* or other carriage, of whatever description, the sum of 4½*d.*; for every horse or other beast, laden or unladen, and *not drawing*, the sum of 1½*d.*" "Provided always, that in cases where any waggon, cart, or other such carriage should be drawn by oxen or other neat cattle, two such oxen or neat cattle should be considered as one horse." And by section 5. it was enacted, "that the said tolls should not be demanded or taken at more than one toll gate in any one day, from *any person* or persons for the same *horses or other cattle* upon the said respective districts of roads; such day to be computed from twelve o'clock in one night till twelve o'clock in the next succeeding night." By section 6. it was further enacted, "that upon payment of the tolls by that act granted, the collector or receiver thereof should, and he was thereby required to deliver gratis, to the person paying such toll, a note or ticket denoting such payment." By section 8. it was enacted, "that none of the tolls by that act granted should be demanded or taken for or in respect of any *carriage*, horse, cattle, or beast employed in carrying or conveying, or going to carry or convey, or returning from carrying or conveying, or having been employed only in carrying or conveying on the same day, stones, bricks, lime, timber, wood, gravel, or other materials for repairing of the said roads, or any other roads in the several townships, parishes, hamlets, or places in which any part of the said roads are situate."

The Defendant was collector duly appointed under the statutes of 39 and 58 G. 3., at *Beckhampton* turnpike gate, of the tolls authorised to be taken by the act of 58 G. 3. On the 18th of *December* 1833, the Plaintiffs came to, passed upon, and along that road, and through that turnpike gate, with a common stage coach

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of the Plaintiffs, with passengers, called the *Regulator*, drawn by four of the Plaintiff's horses, and paid the toll of 1s. 6d., being at and after the rate of 4½d. for each and every of the four horses so drawing the said coach; and the Defendant delivered to the coachman a note or ticket denoting such payment. On the same day, and before twelve o'clock at night, the Plaintiffs came and passed upon and along the said road, with another common stage coach of the Plaintiffs, called the *Regulator*, drawn by the same four horses as the first mentioned coach, but carrying different passengers; and the Plaintiffs then produced the note or ticket so received as aforesaid, and claimed to pass through the same gate with their said last-mentioned coach and passengers, and the same four horses, without further payment of toll under the said last-mentioned acts; but the Defendant refused to allow the horses so drawing the last-mentioned coach to pass through the toll gate with the last-mentioned coach until he had been paid 1s. 6d., being the amount of toll claimed for the horses drawing the coach, at and after the rate of 4½d. for each and every horse so drawing the same; and the Defendant demanded and received the last-mentioned sum of 1s. 6d. from the Plaintiffs, and against their will.

The question for the opinion of the Court was, whether the Plaintiffs ought to recover as money had and received by the Defendant to the use of the Plaintiffs the said sum of 1s. 6d. so demanded and received by the Defendant for and in respect of the said horses so drawing the said last-mentioned coach coming and passing through the said toll gate.

Blackburne for the Plaintiffs. By these acts the toll is imposed on the horse and not on the carriage, and the Defendant had no right to a second toll the same day in respect of the same horses although drawing a different carriage. Toll cannot be taken unless the

language of the act imposing it be unambiguous; *Bussey v. Storey* (a), *Leeds and Liverpool Canal Company v. Hustler* (b); and where the exemption from toll is clear, it shall always prevail: *Hopkins v. Thorogood* (c), *Chambers v. Williams* (d), *Fearnley v. Morley* (e), *Jackson v. Curwen*. (g) Here, by s. 5. of 58 G. 3., no toll shall be taken at more than one gate on the same day from any person for the same horses; and by s. 16. 39 G. 3. no person shall pay more than once on the same day in respect of the same carriage or horse. *Gray v. Shilling* (h) is in point for the Plaintiff. There, by a local act under which a turnpike gate was erected at L., the toll when carriages passed was imposed on the carriages, not on the horses drawing them; and persons having paid on passing were, on their return the same day, exempt from toll. By a subsequent local act, applying to the same turnpike, and reciting the former act, the old tolls were repealed, and the new toll, when carriages passed, was imposed, not on the carriages, but on the horses drawing them: in the latter act, all the provisions, regulations, and clauses of the former were continued as fully as if they had been re-enacted: it was held, that where the toll imposed by the latter act had been paid for horses passing with a carriage, those horses were exempted from toll on returning the same day, though with a different carriage.

Stephen Serjt. contrd. Taking the two acts together, it is clear that in this case the toll is imposed on the coach, and not on the horses. One toll is imposed on horses drawing; a lower toll on horses not drawing; and the exemption in the first act, which is incorporated

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(a) 4 B. & Adol. 98.

(b) 1 B. & C. 424.

(c) 2 B. & Adol. 916.

(d) 5 B. & C. 36. n.

(e) 5 B. & C. 25.

(g) *Ibid.* 31.

(h) 2 B. & B. 30.

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into the second, is on *carriage* or horse passing a second time the same day; and the collector is authorised to distrain for his toll, *carriages on which toll is imposed*. The word *carriage* in those clauses, and in the clause exempting stone carts and the like, must have *some* meaning; and it can have none, unless, taking it in conjunction with the circumstance that the toll is collected for horses *drawing*, the Court shall infer that, substantially, the toll is imposed on the carriage. And it would be unreasonable if it were otherwise; for the tax falls ultimately upon the passengers in the coach, being calculated and charged by the coach proprietor in the amount of the fare: but, according to the construction contended for on the other side, the second set of passengers would contribute nothing to the expenses of the road. The subject of the toll is the combination of carriage and horse; and that distinguishes the present case from *Gray v. Shilling*, where the word *carriage* is not found in the exempting clause, the exemption being expressly conferred on *persons* having paid the toll. So, in the other cases cited, the language of the respective acts of parliament differed from that used in the present case, and the argument now urged for the Defendant was not presented to the Court.

TINDAL C. J. It is unnecessary, on the present occasion, to refer to the various cases determined on other acts of parliament: it is sufficient to look at this act, and apply a plain understanding to it, always remembering that we are not affirmatively to impose a toll, unless the language of the legislature be clear. The question here is, whether a second toll is imposed on the same horses passing the same day with a different carriage. It is said that this depends on the clause of exemption in the statute 39 G. 3. It may be so; but we must first look at the section in 58 G. 3., which

imposes the toll: "for every *horse* or other beast *drawing any waggon*, cart, or other such carriage, the sum of 6d.; for every *horse* or other beast *drawing any cart*, or other carriage, of whatever description, the sum of 4½d.; for every horse or other beast, laden or unladen, and *not drawing*, the sum of 1½d." Looking no further, can any one doubt whether the toll is imposed on the animal or the carriage? In many acts the toll is imposed specifically on the carriage. If the legislature be aware that words so different must be used when that is intended, why are we to suppose that the horse is not meant here?

It is said, look at the clause of exemption, "that no person shall be subject or liable to pay any of the tolls hereby granted more than once in any one day, to be computed from twelve o'clock at night to twelve o'clock the succeeding night, within each district, for or in respect of any *carriage*, or any *horse*, mare, gelding, or other cattle passing through all or any turnpike or turnpikes continued or erected by virtue of this act within this district, such person producing a ticket denoting that the respective tolls have been paid on that day." To which I answer, although it may be difficult to give an explicit meaning to the word *carriage*, where no toll has been imposed on the carriage, we can never give it the meaning required by the Defendant, when there is a toll directly and affirmatively laid on the horse.

It is then said that there are other clauses in which the word *carriage* occurs, and in which it will be difficult to attach any meaning to the word, unless a carriage be the subject of toll. "If any person or persons subject to the payment of any of the said tolls shall, after demand thereof made, neglect or refuse to pay the same or any part thereof, it shall be lawful for the person or persons appointed to collect the tolls, to seize and distrain any horse or horses or other cattle, together with their bridles, saddles, gears,

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harness, or accoutrements, or their loading, orto stop, seize, and distrain any carriage, with its loading, upon which such toll is by this act imposed." We might reasonably say, that as the power of distress first specifies the horse upon which the toll has previously been imposed, the inference is, that the words, "upon which such toll is by this act imposed," apply to the horse and not to the carriage, and that the power of distress is extended to the carriage, only for the sake of further security. But it is unnecessary to give a construction to every clause in which the word carriage is incidentally used, when it is plain that the toll is imposed on horses.

PARK J. Every case of this sort must depend on the words of the act imposing the toll: the cases are numerous, because such acts are often incorrectly drawn; and as most tolls are let out, the lessees, who desire to make all they can, will try their hand again, although the point may have been decided. But I cannot distinguish this case from *Gray v. Shilling*; and though, in the other cases which have been mentioned, there may be here and there expressions which suit the Defendant, yet, in substance, the cases all coincide with *Gray v. Shilling*.

GASELEE J. From the beginning it appeared to me, that there never was a clearer case than the present, and I have heard nothing to induce me to change my opinion. A toll is clearly and explicitly imposed on the horse, and none on the carriage. The difficulty, if any, has arisen from the introduction of the word carriage into the eighth clause, but even there the words are, that none of the tolls imposed by the act shall be taken for "or in respect of any carriage" employed in conveying materials for the repair of the road; and when we see that the toll on a horse employed in draw-

ing a carriage is $4\frac{1}{2}d.$, and on a horse without any carriage $1\frac{1}{2}d.$, we might say that the toll is imposed on the horse drawing, in respect of the carriage.

However, the toll being imposed by sect. 4. explicitly on the horse, that cannot be altered by any conjectures as to ambiguities in a succeeding clause.

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BOSANQUET J. I am of the same opinion. Cases of this kind depend on the construction of the particular act, and most acts of this sort are inaccurately drawn. However, there can be no doubt here, that in both the acts the toll is imposed on the horse, and not on the carriage. In the exempting clause of the first act the word carriage has been inserted, and undoubtedly it is unnecessary: but it is omitted in sect. 5., the clause of exemption in the second act, and it must have appeared there also, if there had been any intention to impose the toll on the carriage.

If we revert to authority, there is no material distinction between this case and *Gray v. Shilling*, or *Jackson v. Curwen*.

Judgment for the Plaintiff.

TREMEERE v. MORISON.

June 4.

COVENANT. The Plaintiff declared (venue *Mid-dlessex*) that, by an indenture of *June* 1812, he demised to one *Edward Howes* a certain messuage, with the appurtenances, for thirty-one years (wanting fifteen days) from the 25th of *December* 1809, *Howes* covenanted

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non-repair, to say, that the premises yield no profit.

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ing to pay Plaintiff a rent of 37*l.* a year, and all levies, taxes, charges, assessments, and payments whatsoever charged on the premises, and to keep the premises in repair: that *Howes* entered; and that afterwards, in *June* 1833, all *Howes's* estate, right, title, interest, and term of years then to come and unexpired in the premises legally came to and vested in the Defendant, who thereupon entered into the premises, and became possessed thereof, to wit, in the county of *Middlesex*: that after the making of the indenture and during the term thereby granted, and after the Defendant became such assignee as aforesaid, and whilst he continued such assignee, to wit, on, &c. at, &c., a large sum of money, to wit, the sum of 27*l.* 15*s.*, of the rent aforesaid for three quarters of a year of the said term then elapsed, became and was due, and still was in arrear and unpaid to the Plaintiff, contrary to the tenor and effect, true intent and meaning, of the said indenture and of the covenant in that behalf so made as aforesaid, to wit, at, &c.: that the Defendant did not, nor would, after the said assignment and during the said term, and whilst the Defendant was so possessed of the said demised premises with the appurtenances as aforesaid, bear, pay, and discharge the levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable after the Defendant became such assignee as aforesaid, and whilst he was and continued such assignee, but wholly omitted and neglected so to do, to wit, at, &c.: that there was now a large sum of money, to wit, the sum of 10*l.*, for and in respect of such levies, taxes, charges, assessments, and payments as aforesaid, for three quarters of a year of the said term, during which period the Defendant was so possessed of the said demised premises with the appurtenances, in arrear, unpaid and undischarged by the Defendant, contrary to the tenor and effect, true intent

and meaning, of the said indenture, and of the said covenant in that behalf so made as aforesaid: and that the Defendant did not, nor would, after the said assignment and during the continuance of the said demise and whilst he was so possessed of the demised premises with the appurtenances as aforesaid, at his own proper costs and charges, as often as need required, well and sufficiently repair the said demised premises.

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The Defendant, after two pleas on which no question arose, pleaded, thirdly, that he ought not to be charged with any damages by reason of the said breaches of covenant, or any or either of them, or any part thereof, otherwise than as administrator of *P. Walker* as thereafter mentioned, because, after the making of the indenture in the declaration mentioned, and during the term thereby granted, to wit, on, &c. at, &c., the said *P. Walker* duly made and published his last will and testament in writing, and thereby, amongst other things, then and there appointed one *James Morrison* sole executor thereof, and afterwards, to wit, on, &c. at, &c. the said *P. Walker* died so possessed of the said demised premises, without revoking or altering his said will; after whose death, to wit, on, &c. at, &c. the said *J. Morrison*, in due form of law, renounced the probate and execution of all and singular the goods, chattels, and credits, which were of the said *P. Walker* at the time of his death; and administration thereof, with the will of the said *P. Walker* annexed, in due form of law, was afterwards, to wit, on, &c. at, &c., granted to the Defendant, who afterwards and after the decease of the said *P. Walker*, to wit, on, &c. at, &c., as such administrator, entered into and upon the said demised premises, and became and was possessed thereof for the residue of the said term of years by the said indenture granted and then and yet to come and unexpired of and in the said demised premises. And the Defendant further said, that he had not, at any time

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since the death of the said *P. Walker*, received and derived, or been able to receive or derive, any profit, interest, or advantage as such administrator or otherwise, by or from the said demised premises with the appurtenances, or any part thereof; and that the said demised premises had not, nor had any part thereof since the death of the said *P. Walker* yielded any profit whatsoever; and that the said term was not now, nor at any time since the death of the said *P. Walker* had the said demised premises or any part thereof, been, of any value whatsoever. And the Defendant further said, that the estate, right, title, interest and term of years, property, profit, claim, and demand whatsoever of the said *P. Walker*, of and in the said demised premises, with the appurtenances or any part thereof, had not at any time come to or vested in the Defendant by assignment, otherwise than under and by virtue of such administration as aforesaid, and that the said entry of the Defendant was made by him as such administrator as aforesaid: and that the Defendant was ready to verify, &c.

The fourth plea was to the same effect, with the addition of an averment of *plenè administravit* and an offer to surrender before the breaches occurred.

The Plaintiff in his replication as to the third plea of the Defendant, so far as the same related to the breach of covenant in the declaration first assigned, said, that the Plaintiff, by reason of any thing by the Defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action against the Defendant, in respect of the said breach of covenant first above assigned, because the said demised premises from the time of the death of the said *P. Walker* hitherto had been and still were of great yearly value, to wit, of the value of the said yearly rent in the declaration mentioned, to wit, at, &c., and that, the Plaintiff prayed might be enquired of by the country, &c.; and the Plaintiff, as to

the third plea of the Defendant, so far as the same related to the said breach of covenant in the declaration secondly above assigned, said, that the Plaintiff by reason of any thing in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the Defendant, in respect of the said breach of covenant secondly above assigned, because the said demised premises from the time of the death of the said *P. Walker* hitherto had been and still were of great yearly value, to wit, of a yearly value sufficient for the payment and discharge of the said levies, taxes, charges, assessments, and payments wherewith the said premises were charged and chargeable as in the declaration mentioned, to wit, at, &c., and that, the Plaintiff prayed might be enquired of by the country, &c.; and the Plaintiff, as to the third plea of the Defendant, so far as the same related to the said breach of covenant in the declaration lastly above assigned, said, that the Plaintiff by reason of any thing by the Defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action against the Defendant, in respect of the said breach of covenant lastly above assigned, because the Defendant, since the death of the said *P. Walker*, could and might have and had received and derived great profit, interest, and advantage by and from the said demised premises with the appurtenances, and that the same from the time of the death of the said *P. Walker* had been and still were of great yearly value, to wit, of the yearly value of 100*L.*, to wit, at, &c., and that, the Plaintiff prayed might be enquired of by the country, &c. The replication to the fourth plea was to the same effect, and in addition, took issue on the averment of *plenè administravit*.

The Defendant demurred to these replications.

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Atcherley Serjt. in support of the demurrer. The replication is ill, for it puts in issue an immaterial fact, viz., whether the premises were of any value. They might be of some value for the purpose of sale, and yet they might yield no profit to the administrator; and unless they yield a profit, the administrator is not liable for rent or taxes; at all events, not beyond the profit yielded. The result of the cases is stated in 1 *Wms. Saunders*, 112. note c. (edit. 5.). "If an executor be sued in his representative capacity for rent accruing in his own time, either in debt or covenant, where the lease is by deed, or in debt or *assumpsit* for use and occupation, where the lease is not by deed, he may plead *plenè administravit*, and under that plea may shew that the land yields no profit, and that he has no assets *aliunde*; but if the land yields a profit equal to the rent, he will fail on a plea of *plenè administravit*, for he is bound to apply the profits of the land towards payment of the rent in the first instance, and his not doing so will be a *devastavit*; if, therefore, the land yields some profit, but less than the rent, it should seem that his plea should be *plenè administravit præter* the profit. If, on the other hand, the executor be sued, as he may be when he enters and is in the actual occupation, in his individual capacity as assignee of the term, in debt on a lease by deed, he must plead specially that he holds only as executor, that the land yields no profit, or less than the rent, and pray whether he shall be charged otherwise than *in dictinet*: in covenant, he must plead the same matters specially:" *Hargrave's* case (a), *Bolton v. Canham* (b), *Helier v. Casebert* (c), *Buckley v. Pirk* (d), *Remnant v. Bremridge* (e), *Rubery v. Stevens*. (g)

(a) 5 Rep. 3.

(b) *Pollexf.* 125. *Freem.* 327.

(c) 1 Lev. 127.

(d) 1 Salk. 316.

(e) 8 Taunt. 191.

(g) 4 B. & Adol. 241.

If the Defendant be sued as assignee and not as administrator, the venue ought to be local, as founded on privity of estate; and then, the declaration is ill for not shewing the county in which the premises lie. [*Tindal* C. J. That sufficiently appears in the averment that the Defendant entered in *Middlesex*, the county in which the venue is laid.] Then, the fourth plea not only tenders the same immaterial issue as the third, but is double, in offering also an issue on the *plene administravit*.

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Coleridge Serjt. *contrd.* The third plea being pleaded to all the breaches is ill; for it is no answer to the third breach alleging non-repair: and a plea which is bad as to part, is bad for the whole: *Webb v. Martin*. (a) That it is no answer to the third breach distinctly appears in *Tilney v. Norris* (b), *Buckley v. Pirk* (c), and *Shepherd's Touchstone*, 178. But, independently of this, the replication takes issue on a material fact. Whether the premises were of value is the proper question: whether the Defendant could or not have made profit of them is either identical with it, or evidence of it. Where an executor, in possession, is sued as assignee on the covenants for rent and repairs, the whole liability is personal, and founded on privity of estate. The law presumes the possession to have value; but the liability is not in principle founded on the perception of the profits, nor measured by them. An ordinary assignee could no more relieve himself from keeping the covenants by alleging the want of profits, than the original lessee. But, as regards *rent*, the law has made a distinction between an executor sued as assignee and an ordinary assignee. It limits the liability on this head

(a) 1 *Lev.* 48.

(c) 1 *Salk.* 316.

(b) 1 *Ld. Raym.* 553. 1 *Salk.*

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to the profits actually received; taking so much of these profits as equals the rent, out of the general body of the assets, and specifically appropriating them to the landlord: *Hargrave's case*. (a) No such distinction, however, prevails as to liability for *repairs*, the lessor having no such privilege in respect of the assets,—the executor assignee no such exemption; but the general rule prevails: *Spencer's case* (b), *Dean and Chapter of Windsor's case* (c), *Tilney v. Norris*. (d) The object of the covenant for repair was the maintenance of the thing in being when the lease was made. Besides, administration is taken upon himself by the Defendant *sponte sua*. The incurring the liability is his own act: the offer to surrender the premises (founded on the case of *Remnant v. Brenbridge*) can have no effect on the Defendant's liability for repairs: and that case turned in effect on the circumstance that the premises yielded no rent. It was an action for use and occupation.

Atcherley, in reply, persisted that the Defendant as administrator was altogether discharged if the premises yielded no profit; and the replication, therefore, should have taken issue on that precise point.

As to the taking out letters of administration being the spontaneous act of the administrator, the same thing might be predicated of an executor who took out probate, since he was at liberty to renounce it.

TINDAL C. J. It is unnecessary for us to give any opinion as to the sufficiency of this replication, because we think that the third and fourth pleas are both bad in law. A plea which is bad in part, is bad altogether;

(a) 5 Rep. 31 b.

(b) 5 Rep. 18. 6th resolution.

(c) 5 Rep. 25. *Dyer*, 13 b.
n. 67.(d) 1 Roll. Abr. Covenant L.
citing *Hyde v. Dean and Chapter of Windsor*, Cro. Eliz. 552.

and these pleas, affecting to give an answer to the breach of covenant in not repairing, as well as not paying rent and taxes, cannot be supported; because the law, as it applies to personal representatives with respect to non-payment of rent or taxes, does not stand on the same footing as the law which binds them to repairs. The two cases are not within the same reason. Rent is received by an executor, not so much in the light of assets, as a profit of the land which is to be handed over to the landlord, in satisfaction or diminution of arrears that may be due. No such reason is applicable to the covenant for repairs. It would be a strange thing to say, for instance, that an executor or administrator shall not be bound to repair in the first year of a term, because they have derived no profit from the premises: in effect, that would be saying that the lessor shall have no rent till the end of the term; for if the executor is not bound to repair in the first year because he has no profits, the same answer might be made in the second, and the premises might go on in a course of deterioration, till the end of the term, when, if the executor were without assets, the lessor might be deprived of any redress. But there is no case to shew, that when an executor is sued as assignee, he is not liable for repairs in the same manner as any other assignee. All the cases relied on for the Defendant are actions for debt, and turn on the *debet*, or *debet* and *detinet*, which are only applicable to demands for non-payment of rent. On the other hand, the cases cited for the Plaintiff tend to shew, that the rule with respect to rent does not extend to a covenant for repair. Let us look at the case of waste, which bears a strong analogy to the present. The law is clear, that "the executor or administrator of a tenant for years shall be punished for waste done in their own time; and that the judgment for the damages shall be against them *de bonis propriis*. And there is no dif-

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ference between permissive and voluntary waste, that will influence this case, because this breach of covenant is in nature of permissive waste; except that the case of waste is stronger; because treble damages are recoverable there, but single damages only in covenant. And if the executor assigns over, waste will lie against him in the *tenuit*; therefore, it is not hard to support this action; and judgment shall be against him *de bonis propriis*.” (a) An executor, therefore, is liable for non-repair; and that, even where he permits dilapidation to continue, which did not commence in his own time. The same point was established in the *Dean and Chapter of Windsor’s* case, where a man demised a house by indenture for years; the lessee, for him and his executors, covenanted and granted with the lessor to repair the house at all times necessary; the lessee assigned it over to *Hyde*, who suffered it to decay; the lessor brought an action of covenant against the assignee. And it was adjudged by *Popham C. J.*, and the whole Court, “that the action of covenant did lie, although the lessee had not covenanted for him and his assigns; for such covenant, which extends to the support of the thing demised, is *quodammodo* appurtenant to it, and goes with it. And in respect the lessee hath taken upon him to bear the charges of the reparations, the yearly rent was the less, which goes to the benefit of the assignee, and *qui sentit commodum sentire debet et onus*.”

On the ground, therefore, that the plea is now brought forward, for the first time, as an answer to an action of covenant for repairs; that no authority has been adduced in support of such a plea; and that the reason of the thing is altogether inconsistent with such a defence; we think that the plea is ill; that judgment must be given for the Plaintiff; and that, as to this

(a) 1 *Ld. Raym.* 554.

point, it is unnecessary to consider whether there is any distinction between the situation of executor and that of administrator.

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PARK J. and GASELEE J. expressed their concurrence.

BOSANQUET J. The general rule is, that the executor of a lessee is liable as assignee, except that, with respect to rent, his liability does not exceed what the property yields. No such exception applies to the covenant for repairs.

Judgment for Plaintiff.

ALCHIN v. HOPKINS, Clerk.

June 5.

IN answer to an action for a debt of 253*l.* due from the Defendant to the Plaintiff, the Defendant put in an agreement for a composition entered into between the Defendant and such of his creditors as signed the same, who thereby agreed not to sue, arrest, or molest the Defendant, "in consideration that the future income of the Defendant might be received by the Rev. Harry Lee, or some other person duly appointed by the Defendant, and applied in liquidation of the Defendant's debts, after providing a competent stipend for a curate to serve the church."

The Defendant had no income other than the profits of a benefice with cure of souls, amounting to about 148*l.* a year.

Mr. Lee had received the amount, and after allowing 90*l.* a year for the performance of the duty, had distributed the residue, with the sanction of the Defendant, among the Defendant's creditors.

A composition with a clergyman, in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under 13 *Elix. c. 20.*

30.848.526.

1834. The Defendant, however, had never signed the agreement.

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The Plaintiff, upon the production of this agreement, was nonsuited, with leave to move to enter a verdict for the amount of his debt. Accordingly,

Coleridge Serjt. in *Easter* term obtained a rule *nisi* to that effect, on the ground that the agreement was not binding on the Defendant, for want of his signature; for want of consideration; and as an infraction of the statute 13 *Eliz. c. 20.*, which prohibits "all chargings of any benefice with cure, with any pension or any profit out of the same to be yielded or taken."

Merewether Serjt. shewed cause.

The Defendant, having acted on the agreement by sanctioning the application of the profits, is bound by it, notwithstanding his omission to sign: *Good v. Cheesman*. (a) And the forbearance of each creditor to sue is a sufficient consideration to bind the others. Nor is the agreement within the prohibition of 13 *Eliz.*, for a curate is first to be provided for, and it does not appear on the face of the instrument that the profits of the benefice are actually conveyed away or charged; and a sequestration arising only incidentally, as a consequence of the clergyman's general liability, is not a charge within 13 *Eliz. c. 20.* *Flight v. Salter* (b), *Newland v. Watkin*. (c)

Coleridge. Taking the agreement and the conduct of the parties together, an intention to charge the benefice plainly appears; and therefore the case falls within the principle laid down in *Gibbons v. Hooper* (d), *Kirlew v. Butts* (e), and *Flight v. Salter*, where all the

(a) 2 *B. & Adol.* 328.

(b) 1 *B. & Adol.* 673.

(c) 9 *Bingh.* 113.

(d) 2 *B. & Adol.* 734.

(e) 2 *B. & Adol.* 736. note.

decisions are collected. The agreement is, at all events, indirectly a charge; and the Defendant cannot do indirectly, what he is prohibited from doing directly. *Doe dem. Mitchinson v. Carter.* (a)

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Cur. adv. vult.

TINDAL C. J. The question brought before the Court in this case is, whether the agreement for a composition entered into between the Defendant and such of his creditors as signed the same, operates as an answer to the present action. By the terms of the agreement, the several creditors who signed the same agreed 'not to sue, arrest, or molest the Defendant "in consideration that the future income of the said Defendant might be received by the Rev. *Harry Lee*, clerk, or some other person duly appointed by the said Defendant, and applied in the liquidation of the said debts." It was found at the trial of the cause, that the Defendant had no other income than the profits of a benefice with cure of souls. The agreement may, therefore, be considered to refer to the income of the Defendant arising from his living, and no other.

The objection made on the part of the Plaintiff is, that the agreement is void by the statute 13 *Elix. c. 20.*, by which "all chargings of any benefices with cure hereafter with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, shall be utterly void." The effect of the instrument, supposing it to have any effect whatever, is to appropriate the future profits of the living to the payment of the debts of the Defendant; for we cannot think the clause by which it is provided that a competent stipend for a curate to serve the church shall be first paid, will take the agreement out of the statute. There are many purposes to which the profits of a benefice ought to be

(a) 8 *T. R.* 300.

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employed, on principles of public policy, besides the finding of a curate, such as the repairs of the chancel and parsonage, the money payments to which the church is liable, and the like. The effect of the instrument, therefore, although not operating as a direct charge, is an agreement to charge the profits of the living; and if such an agreement were not held to fall within the prohibition of the statute, all its purposes might be avoided with the greatest facility.

But, independently of the objection under the statute of *Elizabeth*, it appears that this agreement was never signed by the Defendant. In case, therefore, the creditors should sue upon it, they would be met by the preliminary objection, that a contract for the profits of a living to be paid over to a trustee or receiver, was a contract "for an interest in or concerning lands, tenements, or hereditaments," and that no action would lie upon it, as it "had not been signed by the Defendant, or by any person thereunto by him lawfully authorized." We think, upon this ground also, the agreement for composition is not of such a description as can be held a bar to the present action. For the principle on which such an agreement is held to operate as an answer to an action by a creditor who has come into it, is, that there has been a substitution of a new agreement, by mutual consent, and on good consideration, in the stead or place of the old contract. This is the point established by the case of *Good v. Cheesman*, to which we entirely accede. The new or substituted agreement must, therefore, of necessity be one which is legal and valid; or the whole ground on which the release of the former contract depends, is destroyed. Inasmuch, however, as the agreement in question is liable to the objections above adverted to, we think it fails as a composition that can be enforced at law.

Rule absolute for entering verdict for Plaintiff
for 253*l*.

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June 5.

ASSUMPSIT. The first count of the declaration stated that on the 12th of *June* 1829, to wit, at *London*, by a certain charterparty then and there made and concluded between *W. S. Jacques*, for and on behalf of himself and the Plaintiffs, other the owners of the ship called the *Warrior*, then lying in the port of *London*, of the one part, and *H. C. Sempill*, freighter of the said ship, of the other part, the said charterparty being sealed with the seal of the said *H. C. Sempill*, It was witnessed, that the said *W. C. Jacques*, acting as aforesaid, for the consideration thereafter mentioned, did thereby promise and agree to and with the said freighter, his executors, administrators, and assigns, that the said ship should set sail and proceed to *Swan River* and *Sydney, New South Wales*, and then proceed to such port or ports, place or places, and for such purposes, as the said freighter, his executors, administrators, or agents, might order or direct; that the ship should immediately go into the *St. Katharine Docks*, and the poop and cabins be erected, altered, and finished in the manner prescribed by the charterparty, on or hereunder set forth, and deliver it to Plaintiffs in a week: Held, that this was not an undertaking for the debt, default, or miscarriage of another, within the statute of frauds.

The guaranty to be signed by *T. M.* was as follows:—“Whereas *H. S.* has hired your ship for six months from the 12th of *July* 1830, and such longer time as his intended voyage may require, and has paid or secured the freight for six months, from the 20th of *August* 1830, and is about to leave *England*, I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months:” Held, an undertaking within the statute of frauds, and insufficient for want of a consideration apparent on the face of it; and consequently that only nominal damages could be recovered against Defendant for failing to procure *T. M.*’s signature, according to his promise.

1. Bach. 159.
1.2. App 2B. 414

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before the 24th of *June*, in consideration whereof, and of every thing above mentioned, *H. C. Sempill*, for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with *W. S. Jacques*, his executors, administrators, and assigns, to take the said ship into his service for the voyage thereinbefore specified, and for and during the term or space of six calendar months certain; and also to pay or cause to be paid unto *W. S. Jacques*, his executors, administrators, and assigns, freight for the use or hire of the said ship, at and after the rate of 17s. per register ton per calendar month, for and during the term or space of six months at the least, to reckon and be accounted from the 12th day of *July* then next ensuing, and at and after the like rate for all further time (if any) that might be necessary for the completion of her aforesaid intended voyage and service, and until she should be finally discharged as aforesaid, or up to the day of her being lost, captured, or last seen or heard of; such freight to be paid in manner following, that is to say, one third of the six months' pay to be paid on the clearing of the vessel outwards at the Custom-house in the port of *London*; 400*l.* in further part of the said monthly pay to be receivable by the said commander out of the freight payable at *New South Wales*, or some other intermediate port; and the remainder of the said monthly pay to be paid by good and approved bills of exchange, at six months' date from the day the said vessel should clear outwards at the Custom-house of *London* :

That after the making of the said charterparty, and before the making of the promise and undertaking of the Defendant next mentioned, divers disputes and differences had arisen and were depending between the Plaintiffs and *H. C. Sempill*, as to whether or not the period of hire of the said ship should commence from the said 12th of

July 1829, and whether or not the payment of the freight so as aforesaid to be paid by *H. C. Sempill*, for the use or hire of the said ship, should commence and be payable from the said 12th of *July 1829*; and also as to whether or not *H. C. Sempill* should give the Plaintiffs security for the payment of freight for the use and hire of the said ship, which should or might become due and payable from *H. C. Sempill* for any period beyond six months, to be reckoned and accounted from the said 12th of *July 1829*, according to the terms and conditions of the charterparty, to wit, at, &c.: and that before and at the time of the making of the promise and undertaking of the Defendant as next mentioned, the Plaintiffs had refused to suffer and permit *H. C. Sempill* to leave *England* in the said ship or vessel, under the charterparty, until he had given such security as aforesaid, to wit, at, &c.:

And thereupon, on the 6th of *October 1829*, to wit, at, &c., in consideration of the premises, and that the Plaintiffs would put an end to the disputes and differences, and consent and agree that the period of hire of the said ship should commence from the 20th of *August 1829*, and that the payment of the freight should commence and be payable from the said 20th of *August 1829*, and that *H. C. Sempill* should not be liable for any charge for the said freight for any period antecedent to the 20th of *August 1829*, and also in consideration that the Plaintiffs, at the special instance and request of the Defendant, would suffer and permit *H. C. Sempill* to leave *England* in the said ship or vessel without giving the said security, the Defendant undertook, and then and there faithfully promised the Plaintiffs to procure one *Thomas Potter Macqueen* duly to sign and enter into a written guaranty, and that he would deliver the same to one *Henry Brittan*, within a week then next following; by which guaranty the said

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T. P. Macqueen should guarantee the Plaintiffs the due and faithful payment of all freight for the use or hire of the said ship, which should or might become due and payable from the said *H. C. Sempill* for any period beyond the said six months pursuant to such charterparty, such period of six months to commence from the said 20th of *August* 1829, according to the terms and conditions of the said charterparty; and that, in default of payment thereof as aforesaid by *H. C. Sempill* or his agents, the said *T. P. Macqueen* would pay the same on demand. And the Plaintiffs averred, that they, confiding in the said promise and undertaking of the Defendant, did afterwards, to wit, on the said 6th of *October* 1829, to wit, at, &c., put an end to the said disputes and differences, and consented and agreed that the period of hire of the said ship should commence from the said 20th of *August* 1829, and that the payment of the freight should commence and be payable from the said 20th of *August* 1829, and that *H. C. Sempill* should not be liable to any charge for the freight for any period antecedent to the 20th of *August* 1829, and did then and there suffer and permit *H. C. Sempill* to leave *England* in the said ship or vessel, without giving the said security: and although a week from the time of the making the Defendant's said promise and undertaking had long since elapsed, yet the Defendant, not regarding his promise and undertaking, but contriving to injure the Plaintiffs in that behalf, did not nor would, within the time aforesaid, or at any time before or afterwards, procure *T. P. Macqueen* to sign or enter into any written guaranty, whereby he guaranteed the due and faithful payment of all freight for the use or hire of the said ship, which should or might become due and payable from *H. C. Sempill* for any period beyond the said six months, pursuant to such charterparty,

such period of six months to commence on the said 20th of *August* 1829, according to the terms and conditions of the said charterparty; and that, in default of payment thereof as aforesaid by *H. C. Sempill* or his agents, the said *T. P. Macqueen* would pay the same on demand; nor did the Defendant, within the space of the said week, or at any time afterwards, procure such or any guaranty of *T. P. Macqueen* to be delivered to the said *H. Brittan*; but so to do had hitherto wholly neglected and refused, and still did neglect and refuse. And the Plaintiffs averred, that *H. C. Sempill* had had the use and hire of the said ship on freight as aforesaid for a long space of time after the expiration of the said six months, commencing from the said 20th of *August* 1829, to wit, from thence hitherto; and that the freight of the said ship or vessel during that period amounted to a large sum of money, to wit, to the amount of 2000*l.*, which was still due and owing to the Plaintiffs: and by means of the premises the Plaintiffs had been and were likely wholly to lose the same, and any future freight that might become due and payable from *H. C. Sempill* for and on behalf of the said ship: and also by means of the premises the Plaintiffs had been and were otherwise much injured and damnified, to wit, at, &c.

The fourth count stated, that on the 12th of *June* 1829, to wit, at, &c., by a certain other charterparty then and there made and concluded between the Plaintiffs, the owners of the ship in the first count mentioned, of the one part, and *H. C. Sempill* of the other part, sealed with the seal of *H. C. Sempill*, it was witnessed of and concerning the said ship, and the freight and hire of the same as in and by the charterparty in the first count mentioned, to wit, at, &c.: That on the 6th of *October* 1829, to wit, at, &c., in consideration that the Plaintiffs, at the special instance and

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request of the Defendant, had consented and agreed that the period of hire of the said ship should commence from the 20th of *August* 1829, instead of the 12th of *July* 1829; and that *H. C. Sempill* should not be liable for any charge for the said freight for any period antecedent to the said 20th of *August* 1829; and also, in consideration that the Plaintiffs, at the special instance and request of the Defendant, had suffered and permitted *H. C. Sempill* to leave *England* in the said ship, on the Defendant's guaranteeing the payment of the said freight, to commence after the period of six months, which said six months were to be accounted from the said 20th of *August* 1829, the Defendant undertook, and then and there faithfully promised the Plaintiffs, to guarantee the Plaintiffs the due and faithful payment of all freight for the use or hire of the said ship or vessel, which should or might become due and payable from *H. C. Sempill* for any period beyond the said six months, such period of six months to commence from the said 20th of *August* 1829, according to the terms and conditions of the said charterparty; and that, in default of payment thereof by *H. C. Sempill* or his agents, the Defendant would pay the same on demand; it being understood that the Defendant was not to be bound by the commander's certificate alone of the amount of freight due, without further proof of such amount being due. And the Plaintiffs averred, that afterwards, to wit, on the 17th of *May* 1831, to wit, at, &c., a large sum of money, to wit, the sum of 2000*l.*, became and was still due and owing from *H. C. Sempill* to the Plaintiffs for freight for the use and hire of the said ship, the same having become due and payable from him for a period beyond the said six months, such period of six months commencing from the said 20th of *August* 1829, according to the terms and conditions of the said charterparty,

to wit, from thence hitherto, and *H. C. Sempill* and his agents had hitherto made default in payment of the same; of which said premises the Defendant afterwards, to wit, on the said 17th of *May* 1831, to wit, at, &c., had notice: and thereupon payment of the freight so due was then and there demanded of him by the Plaintiffs. Yet the Defendant, not regarding his said last-mentioned promise and undertaking, but contriving and intending to injure the Plaintiffs in that behalf, had not as yet paid them the said freight or sum of 2000*l.* so due and owing as aforesaid, but so to do had hitherto wholly neglected and refused, to wit, at, &c.

The Defendant pleaded the general issue.

At the trial before *Tindal* C. J., *London* sittings after last *Hilary* term, a verdict was found for the Plaintiffs for 155*l.* 9*s.* 8*d.*, subject to the opinion of the Court on the following case:—

The Plaintiffs, at the time of entering into the charterparty set out in the pleadings, and up to the time of this action, were the owners of the ship *Warrior*. On the 12th of *June* 1829, the charterparty set out in the pleadings was made and concluded in *London* between the Plaintiff *W. S. Jaques*, acting for and on behalf of himself and the other Plaintiffs, and *H. C. Sempill*, under the respective seals of *W. S. Jaques* and *H. C. Sempill*.

In pursuance of that charterparty, the ship went into the *St. Katharine's Docks* on the 24th of *June* 1829, and was, on the day after, in a fit state to receive and take on board her cargo; and the freighter then took possession of her: but the poop and cabins were not completely fitted up and furnished in pursuance of the charterparty until some time afterwards, although many passengers were engaged and took possession of the ship some time before the painting was completely finished.

Previous to the ship's being ready for sea, and about

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the latter end of *September* 1829, disputes and differences arose between the Plaintiffs and *H. C. Sempill*, arising out of the poop and cabins not being completely fitted up and finished by the 24th of *June*, and otherwise as to whether or not the period of hire of the ship should commence from the 12th of *July*, as stipulated in the charterparty; and as to whether or not the payment of freight should commence and be payable from that day; and also as to whether or not *H. C. Sempill* should give the Plaintiffs a security for the payment of the freight which should become due for any period beyond the six months, to be reckoned from that day; and also as to whether or not *H. C. Sempill* should continue the ship in his service after her arrival and discharge at *Swan River*. The Plaintiffs refused to allow the vessel to go to sea until the settlement of such disputes and differences.

On the 2d of *October* 1829, the Defendant, then acting as the attorney for *H. C. Sempill*, and also as the attorney for *T. P. Macqueen*, wrote to the Plaintiff *Jacques* the following letter: —

“ Sir, — My friend and client *Mr. Sempill* has been with me, accompanied by *Mr. Cross* and the captain of the *Warrior*, to arrange finally the settlement of the affairs of that ship previous to her departure from the port of *London*. The only difficulty that presented itself to a fair and proper conclusion, was the period from which *Mr. Sempill's* payment of the six months' rent should commence; *Mr. Cross* proposing that the day should be from the first week in *August*; *Mr. Sempill* declining to accede to such a proposal, and suggesting that the period of payment should not commence till the 1st of *September*. Upon reference to your captain, it was admitted (and in which admission *Mr. Cross* acquiesced) that the reparations and completion of the cabins and other parts of the ship were not completed until the 12th

of *August*, although the owners covenanted that all should be completely finished by the 24th of *June*; in which case the rent was to commence from the 12th of *July*, thus giving Mr. *Sempill* a clear period of eighteen days from the day of completion of repairs to the day of commencement of payment. Mr. *Sempill* really is not bound to make the payment required of him; and on his behalf I decline to advise him to do so. Mr. *Cross* has asked me for some security for the surplus of six months' rent, if his hire exceeds that term; this Mr. *Sempill* is not bound to give, neither have the owners any right to require; but if the other part of our difference on Mr. *Sempill's* reasonable request be acquiesced in, I have no objection on his part to give them good and sufficient security, otherwise I must decline it.

"I beg the favour of hearing from you by return of post, with the determination of the owners of *Bristol*.
J. P. Bearan."

In consequence of that letter, and for the purpose of settling the disputes and differences between the parties, on the 6th of *October* 1829, a meeting took place between *W. Cross*, one of the Plaintiffs, the said *H. C. Sempill*, the Defendant as attorney on his behalf, and Mr. *Britton*, as attorney for the Plaintiffs.

On that occasion *H. C. Sempill* drew up and signed the following letter:—"Gentlemen,—I beg leave to inform you that I will not require the *Warrior* for any period after she has performed her voyage to *Sydney*, and discharged her cargo. I am, &c. *H. C. Sempill.*"

The following memorandum was also indorsed on the charterparty held by *H. C. Sempill*, and it was signed by *W. Cross* for himself and the other Plaintiffs:—"For and on behalf of *W. S. Jacques*, myself, and the other owners of the ship *Warrior*, chartered by *H. C. Sempill*, I hereby, in consequence of

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the reparations to such ship not having been completed by the period in the charterparty mentioned, covenant, promise, and undertake that the period of hire of the before-mentioned ship shall commence from the 20th of *August* last past; and that the payment of the freight of such vessel shall commence and be payable from the 20th of *August* last past; and that Mr. *Sempill* shall not be liable for any charge for freight or rent for any period antecedent to such 20th of *August* 1829. For self and other owners, *W. Cross*."

On that occasion, also, a guaranty written in the shape of a letter, in the following form, and addressed to *W. S. Jacques*, was drawn up for the signature of *T. P. Macqueen*, and agreed on by the Defendant, viz.:

"Sir,—In consideration of your having, on behalf of yourself and other owners of the ship called the *Warrior*, entered into a charterparty of affreightment with Mr. *H. C. Sempill* for a voyage of the said ship or vessel to the *Swan River* and *Sydney, New South Wales*, whereby it is agreed that the said ship shall remain and continue in the service of the said freighter for and during the term or space of six calendar months at the least, to reckon and be accounted from the 12th day of *July* last past, and for and during such longer time or term, if any, as may be necessary to complete the said intended voyage up to the day of her final discharge; and whereby, after covenanting for the payment of the freight for and during the said six months, at the times and in manner therein mentioned, the said *H. C. Sempill* did covenant that the freight for any period beyond the said six months shall be paid in *London* by the freighter or his agents, as in the said charterparty mentioned; and whereas the said *H. C. Sempill* hath paid or secured to be paid the said freight for the space or period of six months, commencing from the 20th of *August* last; and the said *H. C. Sempill* being about to leave *England* in

the said ship, I have consented to guarantee the owners of the said ship the payment of the said freight, to commence after the said period of six months, which six months is to be accounted from the 20th of *August* last past; I do hereby guarantee unto you, on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use or hire of the said ship which shall or may become due and payable from the said *H. C. Sempill* for any period beyond the said six months, pursuant to such charterparty, such period of six months to commence from the 20th of *August* last, according to the terms and conditions of the said charterparty; and in default of the payment thereof as aforesaid by the said *H. C. Sempill*, or his agents, I hereby undertake and agree to pay the same on demand. Dated *London*, this 6th day of *October* 1829. Yours, &c."

And the Defendant, at the foot of the said guaranty, wrote and signed the following undertaking:—"I undertake to get a copy of the above guaranty duly signed by *Thomas Potter Macqueen*, Esq. M.P., and within a week delivered to Mr. *Brittan*. *J. P. Beavan*."

A witness stated that the memorandum on the charterparty, and the undertaking of the Defendant to get the signature of Mr. *Macqueen* to the guaranty for the payment of the freight, were so signed reciprocally, in consideration the one of the other.

After the transactions which took place at that meeting, the ship set sail and left *England* on her voyage, on the 10th of *October* 1829.

The Defendant never got a copy of the above mentioned guaranty signed by *T. P. Macqueen*, although repeated applications were made by the Plaintiffs to the Defendant for that purpose; nor did *T. P. Macqueen* ever sign the same. But the Defendant proposed to the attorney for the Plaintiffs, that he would, himself, in

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lieu of the guaranty by *T. P. Macqueen*, sign the following letter; and he did, in the month of *November* 1830, write and sign a letter addressed to *W. S. Jacques*, of which the following is a copy: —

“ Sir, — In consideration of your having, on behalf of yourself and other owners of the ship called the *Warrior*, entered into a charterparty of affreightment with Mr. *H. C. Sempill*, for a voyage of the said ship to *Swan River* and *Sydney, New South Wales*, whereby it is agreed that the said ship shall remain and continue in the service of the said freighter for and during the term or space of six calendar months at least, to reckon and be accounted from the 12th of *July* last past, and for and during such longer time or term, if any, as may be necessary to complete the said intended voyage up to the day of her final discharge; and whereby, after covenanting for payment of the freight for and during the said six months, at the times and in manner therein mentioned, the said *H. C. Sempill* did covenant that the freight, for any period beyond the said six months, shall be paid in *London* by the freighter or his agents, as in the said charterparty mentioned; and whereas the said *H. C. Sempill* hath paid or secured to be paid the said freight for the space or period of six months, commencing from the 20th of *August* last, and the said *H. C. Sempill* being about to leave *England* in the said ship, I have consented to guarantee the owners of the said ship the payment of the said freight, to commence after the period of six months, which six months is to be accounted from the 20th of *August* last past; I do hereby guarantee unto you on behalf of yourself and other owners of the said ship, the due and faithful payment of all freight for the use or hire of the said ship or vessel, which shall or may become due and payable from the said *H. C. Sempill* for any period beyond the six months, such period of six months to commence

from the 20th of *August* last, according to the terms and conditions of the said charterparty; and in default of payment thereof as aforesaid, by the said *H. C. Sempill* or his agents, I hereby undertake and agree to pay the same on demand: it being understood that I am not to be bound by the commander's certificate alone of the amount of freight due, without further proof of such amount being due. Dated the 6th of *October* 1829.
Yours, *J. P. Beavan. London.*"

The ship remained in the service of *H. C. Sempill* under the said terms until the 15th of *June* 1830, when she finally discharged her cargo at *Sydney, New South Wales*.

There was 1557*l.* 9*s.* 8*d.* due from *H. C. Sempill* to the Plaintiffs, for the freight of the ship for a period beyond the six months, commencing from the 20th of *August* 1829, and the Defendant had notice thereof before the commencement of the action, and had refused to pay the same.

The question for the opinion of the Court was, whether, under the above circumstances, the Plaintiffs were entitled to recover under all or any one or more of the counts of the declaration in this action. If the Court should be of opinion that the Plaintiffs were entitled to recover, the verdict was to stand, either for the said sum of 1557*l.* 9*s.* 8*d.*, or for nominal damages, as the Court should direct, with liberty to the Plaintiffs to enter it up on any one or more of the said counts as might be thought fit. But if the Court should be of opinion that the Plaintiffs were not entitled to recover in this action, then a nonsuit was to be entered.

The case was argued in *Easter* term by *Wilde* Serjt. for the Plaintiffs, and *Coleridge* Serjt. for the Defendant.

On the part of the Defendant the following objections were raised.

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1834. First, That the charterparty produced in evidence was misstated in the first count. It is not sufficient in pleading to set out a deed *in hæc verba* ; it must be set out according to its legal effect : 2 *Wms. Saund.* 97. b. (note). The legal effect of the charterparty produced in evidence was, an agreement between *Jacques*, on the one side, and *Sempill*, the freighter of the ship, on the other ; for one partner cannot bind another by deed ; *Harrison v. Jackson* (a) ; and though the deed be adopted by the other, the one who executes it must sue alone : *Metcalf v. Rycroft* (b), *Berkeley v. Hardy* (c), *Steiglitz v. Egginton*. (d) But the declaration here alleges that by the charterparty, *Jacques*, acting on behalf of himself and the other Plaintiffs, agreed with *Sempill* ; stating it therefore, in effect, to be an agreement, not between *Jacques* and *Sempill*, but between all the Plaintiffs and *Sempill*.

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Secondly, As the Plaintiffs, according to the authorities cited, could not have sued *Sempill* upon the charterparty, neither can they sue the Defendant for a cause of action arising out of such charterparty. There is no consideration accruing to *them* for the Defendant's supposed liability.

Thirdly, The consideration, as alleged, has not been proved. Part of that consideration is, that the Plaintiffs would allow *Sempill* to leave *England* in the ship without giving the security that had been required ; and it is nowhere stated, in the special case, that *Sempill* departed without giving such security.

Fourthly, The promise on which the action is brought is a promise to answer for the debt, default, or miscarriage of another ; and therefore under the statute of frauds no action can be maintained upon it, because the consideration for the promise, as well as the promise

(a) 7 *T. R.* 207.

(b) 6 *M. & S.* 75.

(c) 5 *B. & C.* 355.

(d) 1 *Holt, N. P. C.* 141.

itself, does not appear in writing, either on the undertaking, or any of the documents connected with it: *Coe v. Duffield* (a), *Boehm v. Campbell* (b), *Benson v. Hippius*. (c) No consideration appears here. The Plaintiffs could not have sued on the deed set out, *Roll. Abr. Faits*, F. pl. 1, 2.; and even if they could, their agreement that the hire of the ship should commence from the 20th of *August*, instead of an earlier period, did not exempt *Sempill* from any portion of the amount of hire for which he might be supposed to be liable, but only shifted the period in respect of which it was to be paid.

Lastly, Assuming for the sake of argument, that the Defendant is liable to the Plaintiffs upon his promise, as collateral to the charterparty, on which *Jacques* only could have sued, yet as the intended guaranty by *Macqueen*, which the Defendant has failed to procure, is a guaranty upon which, for want of a consideration expressed on the face of it, the Plaintiffs could not have recovered under the statute of frauds, they can recover no more than nominal damages against the Defendant. The guaranty to be signed by *Macqueen* expresses none but bygone considerations. The same objection applies to the guaranty signed by the Defendant.

For the Plaintiffs it was answered,

First, That the effect of the charterparty was correctly described as an agreement by *Jacques* on behalf of the other owners, on which *Jacques* was the party legally entitled to sue. But great latitude is allowed by the Courts in the statement of matters merely introductory to the contract on which the Plaintiff sues: *Purcell v.*

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(a) 7 B. M. 252.
(b) 3 B. M. 15.

(c) 1 M. & P. 246.

1834. *M'Namara (a), Phillips v. Shaw (b), Stoddart v. Palmer (c), Ditcham v. Chivis (d), Frith v. Gray. (e)*

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Secondly, That even admitting the Plaintiffs could not have sued on the charterparty, they might, nevertheless, be competent to sue on an independent agreement made by the Defendant with them, on a matter collateral to the charterparty.

Thirdly, That it might be collected from the special case, that the whole of the consideration alleged for the Defendant's separate agreement had been proved, for it appeared that *Sempill* had been *allowed* to sail upon the Defendant's promise to procure *Macqueen's* guaranty; and it must be thence inferred that he had sailed without giving the security originally required.

Fourthly, That the Defendant's promise was not an undertaking for the default, debt, or miscarriage of another, but an original promise to procure a guaranty for the Plaintiffs in case of their renouncing certain claims they might have enforced against *Sempill*; for which promise such renunciation afforded a sufficient consideration: and,

Lastly, that there were sufficient considerations for the Defendant's guaranty, and the guaranty to be given by *Macqueen*; and that such considerations—being in substance the same as those on which the Defendant's promise was given—sufficiently appeared upon *Macqueen's* guaranty, or the documents connected with it. Among others, the Defendant's letter of the 2d of October 1829, which being written by the Defendant as attorney for *Macqueen*, may be considered as if it had been signed by *Macqueen* himself. In the construction of such documents, considerable intendments are al-

(a) 9 *East*, 157.

(b) 4 *B. & Ald.* 435.

(c) 3 *B. & C.* 2.

(d) 4 *Bingh.* 706.

(e) 4 *T. R.* 561. note.

ways made in favour of the consideration, and in support of the contract: *Newbury v. Armstrong* (a), *Stadt v. Lill* (b), *Coe v. Duffield* (c), *Redhead v. Cator* (d), *Wilson v. Hart* (e), *Benson v. Hippius* (g), *Boehm v. Campbell* (h), *Pace v. Marsh*. (i)

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Cur. adv. vult.

TINDAL C. J. This is an action of *assumpsit*, brought by the Plaintiffs to recover damages for the breach, by the Defendant, of a promise to procure one *Thomas Potter Macqueen* to sign a written guaranty, and to cause the same to be delivered to the Plaintiffs within a certain time. The Plaintiffs have also declared in some of the counts upon a guaranty given by the Defendant himself; but it appears to us that the principal question arises on the promise to procure the guaranty of another, as set out in the first count of the declaration.

Many objections have been urged against the Plaintiff's right to recover upon that count. In the first place, it is objected, that the charterparty set out in that count is misdescribed. The first count states it to be a charterparty under seal, "made between *Richard Singer Jacques* for and on behalf of himself and the said Plaintiffs, other the owners of the said ship or vessel called the *Warrior*, of the one part, and *Sempill*, the freighter of the ship, of the other part," and proceeds to allege, that by such charterparty "it was witnessed that *Jacques* acting as aforesaid, did agree with the freighter" that the ship should receive a cargo from the freighter, and sail on the voyage specified in the charterparty.

The charterparty having been pleaded in the very

(a) 6 *Bingh.* 201.

(b) 9 *East*, 348.

(c) 7 *B. M.* 252.

(d) 1 *Stark.* 14.

(e) 1 *B. M.* 45.

(g) 1 *M. & P.* 246.

(h) 3 *B. M.* 15.

(i) 1 *Bingh.* 216.

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terms in which it is made, the objection of misdescription, which resolves itself into an objection of variance between the deed as stated on the record, and the deed produced in evidence, cannot apply to the present case. But it is further urged in argument that the party who pleads a deed, must plead it according to its legal operation, and not in the words of the deed itself; and that by pursuing the latter course, the deed is improperly set out. Now, although it is undoubtedly true, (see the cases collected in the note to 2 *Wms. Saund.* 97. *b.*), that where a deed may operate different ways, the party who pleads it is bound to plead it as he intends to use it, and not to leave it to the Court to draw the inference from the deed itself; yet, in the present case, the Plaintiff has in effect so pleaded it: for the other owners not being made parties to the deed, and not having executed it, the legal operation of the charterparty was, that it was the agreement of *Jacques* only, though made as the deed purports, and as the declaration states, on behalf of himself and the other joint owners of the vessel.

It is objected, secondly, that upon the face of the count itself the present action must fail, because as the persons who are Plaintiffs in this action could not have sued *Sempill* upon the charterparty, so they cannot sue upon the cause of action stated in that count. It must be admitted on the authority of the cases cited in the argument, that the deed not having been executed by the several Plaintiffs, and the Plaintiffs not having been expressed to be parties to it, they could neither sue nor be sued thereon. But as the present action is not brought upon the charterparty, but upon a new contract made directly between the Defendant and the Plaintiffs, which contract is perfectly collateral to the contract contained in the charterparty, we think it is by no means a consequence that because the Plaintiffs could not have

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sued upon the original charterparty, therefore they cannot become Plaintiffs in an action brought on the new contract.

The ground of the present action is not that the former charterparty was executed by the Plaintiffs, but that a charterparty had been executed by one of the joint owners for the rest, and that all the joint owners had acted upon the stipulations of that charterparty; that they had allowed the freighter to take possession of the ship, in pursuance of the charterparty; to put his goods on board the ship; had allowed the ship to sail, and the voyage to be performed; and had, in fact, adopted the charterparty in the same manner, and to the same extent, as if they had been made parties to, and had executed the same. Under these circumstances, we see no objection if a collateral promise is made between the Defendant and the Plaintiffs for the payment of the freight, that such promise should be made the ground of action in the name of all the joint owners to whom such promise was made, notwithstanding the same Plaintiffs could not have maintained an action in their own name for the non-compliance with the stipulations in the original charterparty. No authority has been cited to that effect, and we see no objection on general principle to such their right to sue.

It is thirdly objected, that the consideration, as stated in the first count, has not been proved. Upon looking, however, at the terms in which the consideration is alleged, and at the facts as stated in the special case, we think there is no substantial or material variance between them. The consideration is alleged to be, first, "in consideration of the premises." This includes the execution of the charterparty by *Jacques* on behalf of himself and the other part owners of the ship, and the disputes and differences which had taken place as to the freight. Now, these facts are proved by the

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written documents set forth in the case, and by the allegations therein contained. A further consideration for the promise is stated to consist of the consent and agreement of the Plaintiffs, that the period of hire of the ship should commence from the 20th of *August* 1829, and the payment of freight from the same day, and that *Sempill* should not be liable for any charge for the freight antecedently to that day. This, again, is proved from the statements in the case. And, lastly, it is alleged, as part of the consideration, that the Plaintiffs would permit *Sempill* to leave *England* in the ship without giving the security that had been required. Now, although this is not stated expressly and in terms in the special case, yet it appears to us to be the necessary inference from the two facts found in the case, that the Plaintiffs had refused to allow the ship to go to sea until the settlement of the disputes and differences; and that she was afterwards, upon the undertaking of the Defendant to get *Macqueen's* guaranty, permitted to sail and to leave *England* on her voyage on the 10th of *October* 1829. The consideration, therefore, as stated in the first count, appears to us to have been substantially, if not accurately, proved.

It is next objected, that the promise on which the action is brought is a promise to answer for the debt, default, or miscarriage of another person; and that no action is maintainable upon it according to the well-known rule of law, because the consideration of the promise does not appear in writing as well as the promise itself. The promise on which the first count is framed is an undertaking by the Defendant to get a copy of a guaranty which is written above it, duly signed by *Mr. Potter Macqueen*, and, within a week afterwards, delivered to the Plaintiffs' agent. The immediate consideration for that promise was the removal by the Plaintiffs of a stop which they had put upon the vessel,

then lying in *St. Katharine's Docks*, and the permitting her to sail on the voyage before the security was signed. Under these circumstances the contract appears to us not to be a contract to answer for the debt, default, or miscarriage of any other person, but a new and immediate contract between the Defendant and the Plaintiffs. If *Mr. Macqueen* had signed the guaranty, that guaranty would, indeed, have been within the statute of frauds; for his is an express guaranty to be answerable for the freight due under the charterparty, if *Sempill* did not pay it. But no person could be answerable on the promise to procure his signature but the Defendant. *Sempill* had never engaged to get the guaranty of *Macqueen*, nor had *Macqueen* engaged to give it. There was, therefore, no default of any one for which the Defendant made himself liable; but he did so simply upon his own immediate contract. For, as to any default of *Sempill* in paying the freight, the action, on the undertaking of the Defendant, could not be dependent on that event; for it would have been maintainable if the guaranty were not signed at any time after the day on which the Defendant engaged it should be given, that is, long before the time when the freight became payable.

But we think the intended guaranty of *Macqueen* is, itself, an agreement within the statute of frauds; and consequently, in order to ascertain the amount of damage which the Plaintiffs have sustained by reason of its not having been given, we must be satisfied that it is such a guaranty as could itself be made the ground of an action. But, after careful examination, we think there is no consideration upon the face of it, either directly expressed or to be supplied by fair and necessary inference. All expressions in it refer to matter that is past, and not to any thing that is future or prospective. The guaranty states that the Plaintiff *Jacques*

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had entered into the charterparty which is there recited: it then states that *Sempill* had paid the six months' freight, and that *Sempill* was about to leave *England* in the ship. This is the whole of the written letter which can, by any construction, be held to refer to consideration. But this is no more than a statement of facts which had already taken place at the time of the guaranty given. It is all past and by-gone consideration. Nothing appears on the agreement to move for the promise on the part of *Macqueen*, which is either beneficial to *Macqueen* or detrimental to the Plaintiffs. Reading, therefore, this letter of guaranty with the desire to discover the mind and intention of the writer, we cannot extract from it, by any necessary intendment, any ground of consideration as between the Plaintiffs and Mr. *Macqueen*; and we cannot think the letter of the Defendant, written on the 2d of *October*, could be called in aid to make out such consideration, merely upon the statement in the case that the Defendant was, at that time, "acting as the attorney for *Sempill* and for Mr. *Macqueen*;" such a statement by no means being equivalent to what is required by the statute of frauds, —that it must be signed "by the party to be charged therewith, or some other person *thereunto* by him lawfully authorized." We, therefore, think that, if an action had been brought against *Macqueen* upon his guaranty, such action must have failed. And the consequence is, that the present Defendant is liable to a verdict against him on the first count, upon the ground that he has broken an original contract; but that he is liable to nominal damages only, upon the principle laid down in the case of *Marzetti v. Williams and Others.* (a)

As to those counts of the declaration which are

(a) 1 B. & Adol. 415.

framed upon a direct guaranty given by the Defendant himself, it would be sufficient to observe that his contract is liable to the same objection as that above stated to the guaranty of *Macqueen*. But it may further be answered, that the Defendant's guaranty was not given until after the ship had been allowed to sail, that is, until after the consideration had taken place. For the letter was not written until the month of *November*, whereas the ship was allowed to sail on her voyage on the 10th of *October* preceding. And although it may be true, as was urged in argument, that it is of no consequence that the agreement was not reduced to writing till long after it was made, nothing more being necessary than that an agreement in writing should be produced in evidence at the trial of the cause; yet, in this case, the Defendant's guaranty was not only not written, but never entered into or given until long after the ship had been allowed to sail, that is, long after the alleged consideration for giving it had taken place. His guaranty was never thought of at the time, nor until long after, when it was found impossible to get *Mr. Macqueen's*. Such guaranty, therefore, appears to have been given without any consideration whatever.

Upon the whole, therefore, we think the verdict ought to stand for the Plaintiffs, but that the damages ought to be reduced to 1s.

Judgment for Plaintiffs accordingly.

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June 6.

SIMONS and BATTLE v. FARREN.

Carrying on the business of a *retail brewer*,
Held, to be no breach of a covenant not to carry on the business of a *common brewer*, or retailer of beer.

COVENANT for two years and a half rent, due by virtue of an indenture of demise of the 9th of *July* 1830, between Plaintiffs and Defendant.

The deed being set out on *oyer*, disclosed a covenant by the Defendant that he would not, at any time during the term thereby granted, set up, use, exercise, carry on, or follow, or permit or suffer to be set up, used, exercised, carried on, or followed, in, upon, or about the messuage, tenement, or dwelling-house and premises thereby demised, or any part thereof, the trade or business of (among others) a *retailer of beer, ale, or spirituous liquors*, without the leave, licence, and consent in writing of the said *Simons and Battley*, their executors, administrators, and assigns, first had and obtained.

The Defendant then pleaded that long before the making of the said indenture of lease in the declaration mentioned, one *Robert Chantrell* and *Mary Ann* his wife, were seised, in right of the said *Mary Ann*, in their demesne as of fee, of and in the said messuage, tenement, or dwelling-house in the declaration mentioned, and being so seised theretofore, to wit, on the 1st of *August* 1820, at, &c., by a certain indenture then and there made between *Robert Chantrell* and *Mary Ann* his wife of the one part, and *Stephen Ponder* of the other part, (which said lease, sealed with the seals of the said *Robert Chantrell* and *Mary Ann* his wife, the Defendant then brought there into Court,) the said *Robert Chantrell* and *Mary Ann* his wife did demise, lease, set and to farm let the said messuage, tenement, or dwelling-house,

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2. 2. R. 690

1. 2. R. 28.

with the appurtenances in the declaration mentioned, unto *Stephen Ponder*, his executors, administrators, and assigns, to have and to hold the same with the appurtenances unto the said *Stephen Ponder*, his executors, administrators, and assigns, from the 24th day of *June* then last, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be completed and ended. And *Stephen Ponder* for himself, his heirs, executors, administrators, and assigns, did in and by the last mentioned indenture, amongst other things, covenant, promise, and agree with and to *Robert Chantrell* and *Mary Ann* his wife, and the heirs and assigns of the said *Mary Ann*, that he, *Stephen Ponder*, his executors, administrators, or assigns, should not at any time during the term by said last-mentioned indenture granted, set up, use, exercise, carry on, or follow, or permit or suffer to be set up, used, exercised, carried on, or followed, in, upon, or about, the messuage, tenement, or dwelling-house and premises thereby demised or any part thereof, the trade or business of (amongst others) a *common brewer*, or *retailer of beer*, without the leave, licence, and consent of said *Robert Chantrell* and *Mary Ann* his wife, and the heirs and assigns of said *Mary Ann*, in writing under his, her, or their hands or hand for that purpose first had and obtained. And in and by the said last mentioned indenture, it was provided always, and the said last-mentioned indenture was declared to be upon the express condition, that if the said *Stephen Ponder*, his executors, administrators, and assigns, should not in all things well and truly perform, fulfil, observe, and keep all and every the covenants, clauses, conditions, provisos, and agreements, in the said last-mentioned indenture contained on his and their parts and behalves, to be paid, performed, fulfilled, observed, and kept, then and from thenceforth, and in either of the said cases so happening,

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the term estate and interest and lease by said last mentioned indenture granted should from thenceforth cease and determine and be utterly void, and from thenceforth it should and might be lawful to and for said *Robert Chantrell* and *Mary Ann* his wife, and the heirs and assigns of said *Mary Ann*, into or upon the said messuage, tenement, or dwelling-house, or any part thereof, in the name of the whole wholly to re-enter. That the Plaintiffs, after the making of the said indenture in the declaration mentioned, to wit, on, &c., at, &c., by a certain licence or consent in writing did authorise and permit the Defendant to use and exercise the trade of *retail brewer* upon the messuage, tenement, or dwelling-house in the declaration mentioned; that, on the day and year last aforesaid, at, &c., the Defendant entered on the same premises demised to him as aforesaid, and did then and there before any of the said rent in the declaration mentioned became due and payable, use, exercise, carry on, and follow the trade of a *retail brewer*; and that whilst he was in the possession and enjoyment of the premises as aforesaid, and whilst he was so using, exercising, carrying on, and following the trade of a retail brewer as aforesaid, and by reason and on the ground that the Defendant so carried on the business of a retail brewer as aforesaid, and that a forfeiture of the said lease secondly above mentioned, was occasioned thereby, one *Robert Dennis Chantrell*, having good right and title to the demised premises with the appurtenances, as eldest son and heir at law to the said *Mary Ann Chantrell*, and before any part of the rent in the declaration mentioned became due and payable, to wit, in *Michaelmas* term, in the first year of *William IV.*, commenced an action of trespass and ejectment in the Court of our Lord the King, before the King himself at *Westminster*, in the name of one *John Doe* as lessee of him the said *Robert Dennis Chantrell*, against one *Richard Roe*,

a casual ejector, for recovering the possession (amongst other things) of the said messuage, tenement, or dwelling-house in the declaration mentioned, with the appurtenances, and caused a declaration in the said action to be delivered to the Defendant, then tenant in possession of the demised premises, with the appurtenances; and such proceedings were thereupon had in the said Court that he, *R. D. Chantrell*, in the name of the said *John Doe* his lessee aforesaid, to wit, in the term of the *Holy Trinity*, in the 1st year of *William IV.*, by the consideration of the same Court, recovered against the said *Richard Roe* a certain term then to come (amongst other things) of and in the said demised premises, with the appurtenances; and afterwards, in the same term, a certain writ of our said Lord the King issued out of the said Court, upon the said judgment, to cause *John Doe*, as lessee of *R. D. Chantrell*, to have full possession then to come, among other things, of and in the said demised premises, with the appurtenances as aforesaid; and thereupon the Defendant, being so tenant in possession of the said demised premises, with the appurtenances, afterwards and before any part of the rent became due from the Defendant to the Plaintiffs, to wit, on the 5th of *August* 1831, at, &c., according to the form of the statute in that case made and provided, did attorn and become tenant to said *R. D. Chantrell*, amongst other things, of and for the said messuage, tenement, and dwelling-house, with the appurtenances, and held and enjoyed the same as tenant to the said *R. D. Chantrell* from thenceforth, whereby the term of years in the indenture of lease in the declaration mentioned from thenceforth wholly ended and determined, and that, the Defendant was ready to verify, &c.

Upon demurrer the question was, whether carrying on the trade of a retail brewer was, under a covenant

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not to carry on the trade of common brewer, or of retailer of beer, such a forfeiture of the Plaintiff's leasehold interest in the premises, as to justify the Defendant in suffering judgment to go by default in the ejectment described in his plea.

The Court having called on

Watson to support the plea, he contended that the trade of a retail brewer and of a retailer of beer, were, in effect, the same trade; and that, though every retailer of beer was not a retail brewer, yet every retail brewer was a retailer of beer. But

The Court, referring to 5 G. 4. c. 54. s. 6.,—by which it is enacted, “That it shall and may be lawful for any brewer or brewers of strong beer only in *Great Britain* for sale, who shall have taken out and paid for his, her, or their licence to brew, at and after the rate of 2*l.* at the least, to retail such beer from the premises where such beer is or has been brewed, and for any person not being a brewer of beer, either for sale or private use, to sell strong beer only brewed by any other brewer, in casks containing not less than five gallons, or in not less than two dozen reputed quart bottles at one time, upon such brewer or other person respectively taking out under the provisions of this act such respective excise licence for that purpose,”—said, that retail brewer did not *ex vi termini* mean a retailer of beer; and there being no covenant against carrying on the trade of retail brewer, the Defendant might have resisted the ejectment, and, if so, the ejectment was no answer to the Plaintiff's demand. Whereupon *Watson* prayed and obtained

Leave to amend, on payment of costs.

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HAMMOND v. HOOLEY.

June 6.

THIS was an action of *assumpsit* for money had and received for post-horse duties. At the trial before Bayley B., Chester Spring assizes 1833, a verdict was found for the Defendant. Upon a motion for a new trial, it was directed that the opinion of the Court should be taken on the following case:—

The Plaintiff was, during the whole period over which the demand extended, the farmer of the post-horse duties for the counties of *Chester* and *Lancaster*. The Defendant was a post-master, letting out horses for hire at *Knutsford* in the county of *Chester*, and within the district of the Plaintiff. From the 7th of *February* 1828, to the 25th of *January* 1831, the Defendant let to hire, on various occasions, divers horses, to go no greater distance than eight miles from the place of letting to hire: on each of those occasions such horses were let to take out and bring back the persons hiring them; and, on each occasion, actually did bring back one or more persons.

Blank forms for the weekly returns of duties, prepared according to the directions of the eighth section of the 4 G. 4. c. 62., were from time to time delivered to the Defendant by the collector for the Plaintiff, which were filled up by the Defendant, and periodically delivered back to the collector.

By 4 G. 4. c. 62. post-masters are to pay for horses let out for a distance not exceeding eight miles, a duty of 1s. 9d. a horse, or one fifth of the sum charged to the hirer, and are to make a return to the stamp office of the number of horses let, the number of miles, the amount charged to the hirer, the fifth part of that amount, or 1s. 9d. for each horse. For a false return the postmaster is liable to a penalty; and the farmer of the duty may

compel him to verify his return on oath. Defendant returned, as the amount of duty for two horses let out for five miles, 2s. 6d., and omitted to state the sum charged to the hirer:

Held, that, notwithstanding such omission, he had sufficiently indicated his election to pay the duty of one fifth, and that the farmer could not claim 1s. 9d. for each horse.

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In those returns such lettings as are above described, viz., to go no greater distance than eight miles, and bring back, were entered according to the following scale:—

Month and Day of the Week.	Day of Month.	Description of Carriage.	No. of Carriage.	Christian and Surname of Driver, also of the Traveller, if hired by the Day, Distance not ascertained.	To what Place hired to go and return, if so hired.	Sum charged.	Post Work.		Day Work.			Amount of Duty.
							No. of Horses.	No. of Miles.	No. of Horses.	No. of Miles.	No. of Days.	
December	26	Chaise		Charles	Castle and back.		2	5				s. d. 2 6
	29	Ditto		Elijah	Tabley and back.		2	3				2 0

The sums thus returned as the amount of duty payable upon such lettings to hire respectively were, every six weeks during the whole period covered by this action, paid by the Defendant to the collector of the Plaintiff.

In none of the entries so made by the Defendant and delivered to the Plaintiff which relate to the several lettings above described was there any statement of the sum charged to the hirer for such letting to hire.

By the second section of the 6 G. 4. c. 62. there is imposed for every horse let for hire, to go no greater distance than eight miles from the place of letting for hire every such horse, a duty of one fifth part of the sum charged for such letting for hire, or 1s. 9d. for every horse: and upon every horse let for hire to go no greater distance than eight miles from the place of letting, where such horse shall not bring back any person, and shall not deviate from the usual line of road between the place of letting and the place to which every such horse shall be hired to go, the sum of 1s.

By the eighth section of the act above referred to, it is enacted, "That the commissioners, at the time

of issuing any licence, shall deliver or cause to be delivered to every postmaster, or other person to whom such licence shall be granted as aforesaid, printed or written papers, entitled "Stamp Office Weekly Accounts," which shall be adapted for the insertion of the following particulars relating to the horses which may be let for hire: viz. the day of the month, the month and the year of such letting for hire, the names of the towns or places from which and to which, or from which and to which and back again, according as the hiring may be, the number of every carriage required by this act to be numbered, the christian and surname of every postillion or driver employed, the amount of the sum charged for or in respect of every letting for hire, the number of horses let for hire, the number of days, and the number of miles for which such horses shall be let for hire, and the amount of the duty payable for and in respect of every such letting for hire, as the case may be or shall require, according to the following, or such other form as the said commissioners shall judge convenient for keeping the accounts." By the twelfth section, the postmaster is to give bonds in a penalty for rendering a true account; and by sect. 30. it is enacted, "That from and after the 31st day of *January* 1824, every person letting horses for hire as aforesaid, shall insert and set forth in his stamp office weekly account, the several particulars following; (that is to say,) whenever he shall let for hire, by the *mile*, any horse, the day of the month, the month and year, for which such horse shall be let for hire, the names of the towns or places from which and to which, or from and to which and back again, such horse shall be hired to go, the number of every carriage which he shall furnish with any such horse, (if by this act required to be numbered,) the christian and surname of every postillion or driver employed therewith, the number of

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horses so let for hire, and also the amount of the duty payable for and in respect of every such letting for hire; and whenever such person letting horses for hire as aforesaid, shall let any horse for hire *for a day* or less period of time, *to be used within the distance of eight miles* from the place of letting for hire such horse as aforesaid, for the purpose of drawing any carriage conveying any person as aforesaid, he shall insert and set forth, in his stamp office weekly account, the several particulars following; (that is to say), the day of the month, the month and year, on which such horse shall be let for hire, the number of every carriage, if by this act required to be numbered, the christian and surname of every postillion or driver employed with such horse, the number of horses so let for hire, and the amount of the sum charged for such letting for hire; and shall be answerable and accountable for one fifth part of such sum of money so charged, or for the sum of 1s. 9d. for each horse so let for hire; and shall enter in his stamp office weekly account, such one fifth part of such sum charged, or the sum of 1s. 9d. for each horse, as and for the duty payable in respect of any horse so let for hire as aforesaid; and whenever such person or persons letting horses for hire as aforesaid, shall let for hire any horse to go no greater distance than eight miles from the place of letting for hire such horse, where such horse shall *not bring back* any person or persons, and shall not deviate from the usual line of road between the place of letting, and the place or distance to which such horse shall be hired to travel or go for the purpose of drawing any carriage or vehicle conveying any person as aforesaid, he shall insert and set forth in his stamp office weekly account, the several particulars following; (that is to say,) the day of the month, and month and year, on which such horse shall be so let for hire, the number of every carriage, if by this act required to be numbered, the christian and surname of

every postillion and driver employed with such horse, the number of horses so let for hire, and also the amount of the duty payable for and in respect of every such letting for hire as aforesaid."

The duty prescribed by this section is the same as that in the second.

The statute then goes on to prescribe the mode of weekly accounts in cases of lettings of horses for less than twenty-eight days: and in cases of lettings of horses for twenty-eight days and more.

By the thirty-third and thirty-fourth sections, the farmer of the duty is authorized to require the postmaster to verify his account on oath before a magistrate.

The question for the opinion of the Court was, whether by virtue of the act of the 4 G. 4. c. 62., the Defendant was liable to pay in respect of each letting to hire of any horse for no greater distance than eight miles, such horse being hired to bring back, and actually bringing back some person, the sum of 1s. 9d. for each horse so let to hire as aforesaid. If the Court should be of opinion that he was so liable, then a verdict was to be entered for the Plaintiff for 20l. 5s. 9d., being the difference between the several sums paid, and those which on that principle ought to have been paid by the Defendant to Plaintiff, for the duties on such lettings.

If the Court should be of a contrary opinion, then the verdict was to stand for the Defendant.

Lloyd, for the Plaintiff, contended that the postmaster having an option to pay 1s. 9d. a horse, or one fifth of the whole sum charged, where the horses are let for a distance of less than eight miles, and being called on to return the whole sum charged or 1s. 9d. for each horse, must, if he omits in his weekly return to specify the whole sum charged, be taken to have elected to pay the 1s. 9d. a horse.

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Jervis contra. It is clear from the weekly account that the postmaster has *not* elected to pay 1s. 9d. a horse, since he returns in one case 2s. 6d. for two horses, and in another, 2s. And his option is not determined by the mere informality of omitting to state the gross sum charged to the hirer of the horses. For that informality he may be liable to a penalty, if it amounts to an omission to render a true account. But the postmaster can have sustained no inconvenience, for he may estimate the gross amount by the number of miles; and at all events may summon the postmaster before a magistrate to verify his account on oath.

Lloyd. The farmer cannot avail himself of the penalty in the bond conditioned for rendering a true account: that penalty goes to the crown: nor will the number of miles afford any certain criterion for discovering the sum charged to the hirer of the horses. In the absence of any gross sum charged to the hirer, the number of horses hired is the only certainty on which the farmer of the duty can calculate; and for that number therefore the postmaster must be taken to have made his election.

TINDAL C. J. The question on this cause arises on the construction to be put on two clauses of the act 4 G. 4. c. 62., compared with the form required to be delivered by the postmaster under the eighth section of the act. By the second section of the act, the duty required to be paid is, "for and in respect of every horse let for hire, to go no greater distance than eight miles from the place of letting for hire every such horse, one fifth part of the sum charged for such letting for hire, or the sum of 1s. 9d. for every horse let for hire."

An option, therefore, is given to the party charged with the duty, whether he will pay a fifth of the whole

sum earned, or 1s. 9d. for each horse let out; and the question is, whether the postmaster here has made his option so as to shew that the fifth of the sum earned is the duty for which he meant to be charged. He has filled up the blank in the form prescribed by the statute as follows:—No. of horses, 2; No. of miles, 5; amount of duty, 2s. 6d.:—No. of horses, 2; No. of miles, 3; amount of duty, 2s.

It is clear from this that he has not elected to be charged in the duty of 1s. 9d. for each horse, since that would have amounted to 3s. 6d. If he has not elected to be charged at that rate, how are we to say he shall be so charged?

It is answered, that he has omitted to state the gross sum earned, and that without such a statement the farmer of the duties has no means of ascertaining whether he has been wronged or not. That may be so; but it does not follow that, against the clear evidence that the postmaster has *not* elected to pay the duty of 1s. 9d. a horse, we are to draw the uncertain inference that he intended to pay it, because he has not stated the amount on which the duty of one fifth is chargeable. Looking at the number of miles specified, there is every reason for believing he has returned a fifth of the entire sum charged; and we are not to assume he has committed a fraud, when, if the fact had been so, the farmer of the duty had the means of discovering it by a summons to appear before a magistrate, and verify on oath the truth of the return. We think that the affirmative allegation to be made out by the Plaintiff has not been established, and that therefore our judgment must be for the Defendant.

PARK J. I am of the same opinion; and the impression which I entertained at first has been changed in the course of the argument. No doubt the De-

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fendant ought to have specified the gross sum on which the duty of one fifth is calculated. But, looking at all the clauses of the act, and seeing that no fraud was intended, or could have been committed, I think our judgment must be for the Defendant. It is manifest the Defendant has not elected to pay the duty of 1*s.* 9*d.* a horse, for the sum to be returned would then have been 3*s.* 6*d.* instead of 2*s.* 6*d.*; and, seeing that the distance specified is only five miles, it is probable that the duty of one fifth has been duly returned. At all events, it was easy for the collector on those data to ascertain the actual amount; and if he remained in any uncertainty, he might have summoned the Defendant before a magistrate.

GASELEE J. Upon reading the case, I thought the Plaintiff was entitled to the duty of 1*s.* 9*d.*; but, after hearing the argument, I do not think the statute so clear as to induce me to differ from the rest of the Court.

BOSANQUET J. I am of opinion that, upon these facts, the Defendant is not liable to be charged the duty of 1*s.* 9*d.* a horse. It is admitted he had an option to pay either at the rate of 1*s.* 9*d.* a horse, or one fifth of the whole sum earned; and it is contended that, on the face of this return, he has made his option. Now, the return mentioning only two horses, shews negatively that he has not elected to pay the duty of 1*s.* 9*d.* But it is urged, that if it appears from the return he does not mean to be charged at the rate of one fifth, it follows that he is liable to pay the duty of 1*s.* 9*d.*; and it is said, his omission to specify the gross sum earned shews that he does not mean to be charged at the rate of one fifth of that sum. But it is not because he has omitted to do something which by the means appointed

in the statute he may be compelled to do, that he is to be charged in a way in which he has clearly elected not to be charged.

The number of miles specified shews, however, that the sum returned is probably the fifth of the gross sum earned; and if the farmer of the duties was dissatisfied, he had only to say, "Fill up that column in the return, or I shall apply to a magistrate."

Judgment for Defendant.

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STRETTON v. BUSNACH.

June 6.

TO debt for use and occupation

The Defendant pleaded that, before and at the time of the making of the several supposed contracts in the declaration mentioned, she was the wife of one *Moise Busnach*, to wit, at, &c.

Replication, that the said *Moise Busnach* was an alien, born in foreign parts out of the allegiance of our Lord the King, and within the allegiance of a foreign state, to wit, in the kingdom of *Barbary*, and not a subject of our said Lord the King by naturalization, denization, or otherwise, to wit, at, &c.: That *Moise Busnach*, so being such alien born, long before and at the time of making the said several contracts in the declaration mentioned, and each and every of them, and from thence hitherto lived and resided in parts beyond the seas, to wit, in the kingdom of *France*; and that, during all that time, the Defendant lived in this kingdom, separate and apart from the said *Moise Busnach*, as a single woman, to wit, at, &c.: That the Plaintiff did not give any credit to *Moise Busnach*, but contracted with De-

To plea of coverture, Replication, that the husband was an alien, not a subject of this country by naturalization or otherwise, and at the time of the contract residing in *France*, that the Defendant lived in this kingdom separate from her husband, that the Plaintiff gave no credit to her husband, but contracted with her as a feme sole, Held, ill.

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pendant as a *feme sole*, and on her sole credit; and that the Defendant made the said several contracts in the declaration mentioned, and each and every of them as such *feme sole* as aforesaid. And that, the Plaintiff was ready to verify. Wherefore, &c.

Rejoinder, that the said *Moise Busnach*, on the 1st of May 1825, and from thence until and upon the 1st of July 1825, lived and resided with the Defendant as his wife within the kingdom of *England*, to wit, at, &c.

Demurrer and joinder.

Butt, for the Defendant, contended that the replication was ill, there being nothing to shew that the Defendant's husband was an alien enemy, exile, civilly dead, or even that he intended permanently to reside abroad. The action, therefore, should have been against the husband, or, at least, he should have been joined for conformity: *Williamson v. Dawes* (a), *Ex parte Franks* (b), *Duchess of Mazarin's case* (c), *Walford v. Duchess de Pienne*. (d)

Comyn, contra, relied on *De Gaillon v. L'Aigle* (e), and contended that, where the husband is abroad and the credit is given to the wife, the wife may be sued alone. [*Tindal C. J.* *De Gaillon v. L'Aigle* is prior to *Marshall v. Rutton* (g). *Gaselee J.* In *De Gaillon v. L'Aigle* it does not appear the husband was ever in *England*; here, the rejoinder shews he was.] Where it is clear the husband has no intention of returning, the circumstance that he has been once in *England* will not discharge the wife. If it were otherwise, she might perish for want of credit for necessaries. [*Bosanquet J.* That argument would apply equally to the wife of an

(a) 9 *Bingh.* 292.

(b) 7 *Bingh.* 762.

(c) 1 *Salk.* 116. 2 *Salk.* 646.

(d) 2 *Esp.* 554.

(e) 1 *B. & P.* 357.

(g) 8 *T. R.* 545.

Englishman who went abroad. In *De Gaillon v. L'Aigle* it was averred that the wife traded generally as a *feme sole*.] Here, it may be collected from the rejoinder that the husband has been abroad eight years; and absence of such a length places the wife on the footing of a *feme sole*. But

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The Court being of opinion that, upon the plea and replication, the Defendant was entitled to judgment,

Comyn prayed and obtained

Leave to amend, on payment of costs.

PICKFORD and Others v. DAVIS.

June 9.

AT the trial before *Bolland B.*, *Buckingham Spring* assizes 1833, a verdict was found for the Plaintiffs, subject to the opinion of the Court on the following case:—

In *Hilary* term 1833, the Plaintiffs, who were carriers, brought this action to recover back the sum of 3*l.* from the Defendant, clerk to the trustees under an act of 1 & 2 G. 4. c. 85., passed the 28th of *May* 1821, entitled, “An Act for amending and more effectually repairing the Highway between *Hockliffe* and *Woburn* in the County of *Bedford*, and for repairing the Road leading through *Woburn* to *Tickford Bridge* in *Newport Pagnell* in the County of *Buckingham*,” as received by the said trustees to the Plaintiffs’ use, under the following circumstances:—

A van of the Plaintiffs’, on four wheels, having the 13 G. 3. c. 84. have been collected and imposed, although erroneously, parties are not relieved from such additional tolls by 4 G. 4. c. 95. s. 6.

Where a local turnpike act directs a higher or lower rate of toll to be collected in respect of the greater or lesser breadth of wheels, and where in addition to the tolls under such local act, the additional tolls in respect of breadth of wheels authorised to be taken by

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fellies of the wheels of less breadth or gauge than four inches and a half from side to side at the bottom or sole thereof, and drawn by four horses, on various days within three months next before the commencement of this action, passed through a turnpike or toll-gate legally erected upon the road leading through *Woburn* to *Tickford Bridge*, being part of the road in the said act mentioned; on each of those days the toll-gate keeper, by direction of the trustees, demanded at the said gate the sum of $6\frac{1}{2}d.$ for each of the horses drawing the van, and refused to allow the van and horses to pass through the gate before the Plaintiffs had paid the sum of $6\frac{1}{2}d.$ for each of the four horses, although the Plaintiffs on the said occasions offered to pay the sum of $4\frac{1}{2}d.$ for each of the horses. The Plaintiffs in consequence, under protest, paid the sum of $6\frac{1}{2}d.$ as a toll for passing through the gate; and the trustees thereby received $3l.$ more than they would have received if $4\frac{1}{2}d.$ only had been demanded and paid for each of the said horses.

Between the months of *May* and *August* 1821, the toll actually demanded and received at each of the gates on the road under the same trust, leading through *Woburn* to *Tickford Bridge*, upon the Plaintiffs' van, with the said wheels, drawn by four horses, was $4\frac{1}{2}d.$ for each of the horses drawing the same.

Between *August* 1821 and *May* 1822, and previously to the passing of the act of 3 G. 4. c. 126., the trustees and commissioners of the said turnpike road demanded and received from the Plaintiffs, at the same gates, in respect of the Plaintiffs' van and horses, a toll of $6\frac{1}{2}d.$ for each of the horses drawing the same; and in and continually from *August* 1822 to *April* 1832, the trustees took and collected on the said road in respect of the Plaintiffs' van and horses the same amount of toll as they had taken and collected between *August* 1821 and *May* 1822.

Between *April* and *August* 1832, the toll demanded and received at each of the gates on the Plaintiffs' van drawn by four horses, was $4\frac{1}{2}d.$ for each horse drawing the same.

From *August* 1832, the toll demanded and received on Plaintiffs' van drawn by four horses, was $6\frac{1}{2}d.$ for each horse drawing the same.

By the general turnpike act, 13 G. 3. c. 84. s. 23. (1773), the trustees of turnpike roads are required "to demand and take for every waggon, wain, cart, or carriage having the fellies of the wheels thereof of less breadth or gauge than six inches from side to side at the least at the bottom or sole thereof, and for the horses or beasts of draught drawing the same, one half more than the tolls or duties which are or shall be payable for the same respectively."

Under the before-mentioned local act of 1 & 2 G. 4. c. 85., the tolls to be taken on the road in question, were, "for every horse or other beast drawing any waggon, wain, or such like carriage, having the fellies of the wheels of the breadth of six inches and upwards, and drawn by five or more horses or other beasts, the sum of $4d.$, and drawn by four, or any less number of horses or other beasts, the sum of $4\frac{1}{2}d.$ For every horse or other beast drawing any waggon, wain, or such like carriage, having the fellies of the wheels of less breadth than six inches, and drawn by four horses or other beasts, the sum of $4\frac{1}{2}d.$, and drawn by three or any less number of horses or other beasts, the sum of $3d.$ "

By the general turnpike act of 3 G. 4. c. 126. (6th of *August* 1822), all the then existing general turnpike acts were repealed; and by sect. 4., after reciting the great importance that one uniform system should be adhered to in the laws for regulating the management and maintenance of turnpike roads throughout the kingdom, it was

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enacted, that "from and after the 1st of *January* 1823, all the provisions and enactments of that act should be extended to all acts of parliament then in force, and to all acts that should thereafter be passed for regulating, repairing, &c. turnpike roads." And by section 7. power was given to the trustees of all local acts to take, after the 1st of *January* 1823, for every waggon, wain, cart, or other such carriage, having the fellies of the wheels thereof of less breadth than $4\frac{1}{2}$ inches at the bottom or soles thereof, or for the horse or horses or cattle drawing the same, one half more than the tolls which were payable by such local acts for any carriage of the same description having the wheels thereof of the breadth of six inches.

By the general turnpike act of 4 G. 4. c. 95. s. 5. (19th of *July* 1823), entitled "An Act to explain and amend the 3 G. 4. c. 126.," it was enacted, "that where the trustees of any road should not, previously to the passing of the 3 G. 4. c. 126., have taken and collected the additional tolls directed by the 13 G. 3., and the local act should not have provided a scale of tolls applicable to the road, such trustees should, from the 1st of *January* 1824, continue to take and receive for every waggon and other such carriage having the fellies of the wheels of less breadth than $4\frac{1}{2}$ inches, the same tolls as were by such local act payable in respect of such waggon and other such carriage." And by the sixth section of the same act, it was enacted, "that where any local act should have a prescribed rate of toll in respect of the breadth of the wheels of carriages, and where the additional toll authorised to be taken by the 13 G. 3. c. 84. should not have been collected and imposed, the trustees should, after the 1st of *January* 1824, continue to collect the tolls prescribed in the local act, and should not collect the increased toll under the seventh section of the 3 G. 4. c. 126.

The Plaintiffs contended that their vans were, previously to the 1st of *January* 1823, and had been ever since the 1st of *January* 1824, subject only to the tolls imposed by 1 & 2 G. 4. c. 85. s. 2., and were not subject to the additional toll under 3 G. 4. c. 126. s. 7.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover back the amount of the tolls they had been compelled to pay over and above the 4½d. upon each horse imposed by the local statute of 1 & 2 G. 4. c. 85.

If the Court should be of opinion the Plaintiffs were so entitled, the verdict was to stand; but if otherwise, a nonsuit was to be entered.

The case was argued in *Hilary* term, by *Wilde* Serjt. for the plaintiffs, and *Storks* Serjt. for the Defendant.

The proposition by which the Plaintiffs claimed their exemption from the additional toll imposed by the seventh section of the 3 G. 4., was, that the twenty-third section of the general act of the 13 G. 3. c. 84., imposing additional toll upon wheels having fellies of less breadth than six inches, was, as to this road, rendered inoperative by the specific provisions of the local act of the 1 & 2 G. 4.; *Ridge v. Garlick* (a); that, at the passing of the general act of the 3 G. 4. there were some roads which were not liable to the additional toll of the 13 G. 3., by reason of their having a local act regulating the toll according to the breadth of wheel; and other roads, upon which, although liable to the additional toll, such additional toll had not been collected. That it was the intention of the legislature, by the fifth and sixth sections of the 4 G. 4., to exempt from the additional toll imposed by the seventh section of 3. G. 4. those roads upon which the additional toll imposed by the 13 G. 3. had not been collected, whether such

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(a) 2 B. Moore, 481.

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omission to collect resulted from non-liability, or from the consent of the trustees of the road; that the fifth section was intended to relieve in the latter case, and the sixth section in the former; that the road in question, not being liable upon the passing of the 3 G. 4. to the additional toll of the twenty-third section of the 13 G. 3. that section having been superseded by the specific provisions of the local act of the 1 & 2 G. 4., was a road which the legislature intended to relieve from the operation of the seventh section of the 3 G. 4., and was therefore within the equity of the sixth section of the 4 G. 4.

For the Defendant it was contended that the case did not fall within the sixth section of 4 G. 4., because, although the local act of 1 & 2 G. 4. imposed a rate of toll varying with the width of wheel, yet the additional toll authorised by the general act 13 G. 3. had actually been collected. The two conditions of the sixth section of 4 G. 4. had not both been complied with.

Cur. adv. vult.

TINDAL C. J. The question which has been raised upon this special case, is this, whether the Defendant was entitled to claim the larger toll of 6 $\frac{1}{2}$ d., or the smaller toll of 4 $\frac{1}{2}$ d. for each horse drawing the Plaintiffs' van, such van having the fellies of the wheels of less breadth than four inches and a half. The toll sought to be recovered back had been taken at the end of the year 1832; and the right of the Plaintiffs to recover, appears to us to depend upon the enquiry, first, whether the general turnpike act, 3 G. 4. c. 126. s. 7., made any and what addition to the tolls imposed by the local act which governs this particular road; and, secondly, if such addition has been made, whether it is in any way altered or affected by the subsequent general turnpike act, 4 G. 4. c. 95. The local act which governed this highway at the time the tolls were

taken, was the 1 & 2 G. 4. c. 85., an act which received the royal assent on the 28th of *May* 1821, and which came into operation from that day. This act repeals the local acts therein enumerated; and in section 18. sets out a scale of tolls to be taken from the time of its passing. By this scale it is enacted, that there shall be taken for every horse drawing any waggon having the fellies of the wheels of the breadth of six inches and upwards, and drawn by four or any less number of horses, the sum of $4\frac{1}{2}d.$; and for every horse drawing any waggon, having the fellies of the wheels of less breadth than six inches, and drawn by four horses, the sum of $4\frac{1}{2}d.$

Under this scale, therefore, it is obvious, that unless it is affected by some of the provisions contained in any former or any subsequent general turnpike act, the toll to be taken from the month of *May* 1821, down to the present time, for every horse drawing the Plaintiffs' van, under the circumstances stated in the case, would have been $4\frac{1}{2}d.$ and no more; the same amount of toll appearing to be imposed where the waggon is drawn by four horses only, whether the fellies of the wheels are of the breadth of six inches and upwards, or of less breadth than six inches.

It appears, accordingly, that from the passing of this act, that is, from *May* 1821, the toll of $4\frac{1}{2}d.$ per horse, and no more, was for some time the toll demanded and taken from the Plaintiffs in respect of their van above described. But in the month of *August* 1821, the trustees of the road demanded and took the larger toll of $6\frac{3}{4}d.$ per horse, insisting as it would seem upon the application of the provision contained in the general turnpike act then in force, viz. the 13 G. 3. c. 84. s. 23., to the present case; under which, where the fellies of the wheels were of less breadth than six inches from side to side, the trustees should take one half more than the tolls or duties which should be payable under any local act.

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 August 1821, without any alteration, down to the passing of the general turnpike act, 3 G. 4. c. 126., which received the royal assent on the 6th of August 1822: and indeed from thence until April 1832. But this clause of the general turnpike act, 13 G. 3., was determined by the Court of Common Pleas, in the case of *Ridge v. Garlick (a)*, not to apply to tolls imposed by local acts, which contained a specific enactment of toll in respect of a particular description of wheel: in which case it was held, that the particular provision of a specific toll, proportioned to the width of the wheels, took the case out of the operation of the general turnpike act, by shewing what the legislature intended in the particular case. We think it clear, therefore, that this increased toll, so long as it depended on the authority of the 13 G. 3., was an illegal toll, being grounded on a misapplication of the provisions of that act.

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This brings us to the question, whether the increased toll of 6½d. per horse, which was illegal under the powers of the former general act, became legal under the powers of the new general turnpike act, the 3 G. 4. c. 126., which came into operation on the 1st of January 1822; and we think the latter act had the effect of authorising such increased toll to be taken. By that act the old general turnpike act 13 G. 3. is repealed, and by section 7. the trustees under any local act then made, or thereafter to be made, were empowered from and after the 1st of January 1823, to take for any waggon having the fellies of less breadth than four inches and a half, or for the horses drawing the same, one half more than the tolls payable by such local act, for any carriage, &c., having the wheels of the breadth of six inches.

That clause differs from the provision contained in

(a) 2 B. Moore, 481.

the 13 G. 3. in this important respect; that whereas the old act contained no reference whatever to tolls payable under local acts, proportioned to the width of the wheels, but proposed to legislate only for the case where a toll was imposed generally on the horse or the carriage; the new act, on the contrary, applies itself distinctly and in terms to the case of local acts containing a scale of tolls proportioned to the width of the wheels, being above or below six inches. To such cases it creates and applies a new scale of increase, namely, a scale where the wheels are less than four inches and a half; or more than four inches and a half, and less than six. Now the precise provision contained in the local act under which this road is governed, is a scale where the wheels are of a width above or below six inches. And we can see no principle of construction upon which it can be held that the scale of increased tolls enacted by the new general turnpike act, should not be held to apply to the scale given by this local act.

We therefore think the increased toll of 6 $\frac{1}{2}$ d. became the legal toll upon each of the horses in question, from the 1st of *January* 1823, and that at all events it continued to be the legal toll until the passing of the subsequent general act of 4 G. 4. c. 95.; and the only remaining question appears to be whether such subsequent act has made any alteration in this respect. The only sections in that act which appear to have any bearing on the question, are the fifth and sixth.

The fifth section relates to one class of cases only; viz. where the commissioners shall not, previous to the passing of the former act, that is, previously to the 6th of *August* 1822, have taken the additional tolls on waggons having the wheels of less breadth than six inches from side to side, directed to be taken by 13 G. 3. c. 84., and the particular or local act *shall not* have provided a scale of tolls applicable to the road. In that case the-

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commissioners are directed, after the 1st of *January* 1824, to continue to take, for every waggon having the fellies of the wheels of less breadth than four inches and a half, the same tolls as are by the local act payable in respect of such waggon. This section, however, cannot apply to the present case; as neither of the conditions specified therein exists here; for the special case finds that the commissioners *did take* previously to the 6th of *August* 1822 the additional tolls directed to be taken by the 13 G. 3. c. 84.; and again, the local act *has* provided a scale of tolls applicable to the particular road.

The sixth section directs, that where any particular act of parliament then in force shall direct a higher or lower rate of toll to be collected, regulated in respect of the greater or lesser breadth of the wheels, and where, in addition to the tolls received under the particular act, the additional tolls in respect of the breadth of wheels authorised to be taken by the act of 13 G. 3., shall *not* have been collected and imposed, the commissioners shall, after the 1st of *January* 1824, continue to take the tolls under the powers of the local act, and shall not impose the additional tolls imposed by the act therein recited, that is, the 3 G. 4. c. 126. And we think the present case does not fall within this section; because, although one of the conditions mentioned therein, namely, that the particular act directs a higher or lower rate of toll to be taken, is found to exist: yet, the second condition, that the additional toll authorised by 13 G. 3. had not been collected and imposed, is denied by the special case. For we cannot give any other sense to the words "collected and imposed" than their ordinary and natural meaning, that is, taken under the real or supposed authority of that statute.

The present case, therefore, appearing to us to be a *third case*, differing from both those intended to be

remedied by the fifth and sixth sections, namely, a case in which the local act *does* direct a higher or lower rate of tolls to be taken in respect of the greater or lesser breadth of the wheels, and in which the additional toll authorised by 13 G. 3. has been collected and imposed, we think it is left untouched by the last general turn-pike act; and consequently that the increased toll of 6½d. is the legal toll.

We therefore think there must be judgment for the Defendant.

Judgment for the Defendant.

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Dismissed 5 L.R. 6 P. 473.

TRIMBEY v. VIGNIER.

June 9.

THIS action was brought in *February* 1833 by the Plaintiff, an *Englishman* resident in *London*, as holder, against the Defendant as the maker of the two promissory notes (one for 610 francs, the other for 300) in the following form:—

“A la fin *Decembre* prochain je payerai à l'ordre de M. *Burillon* la somme de six cents dix francs valeur en marchandize.

“*Paris*, le 10 *Juillet* 1829.

“B. P., 610 francs.

“*E. Vignier*,

“*Rue St. Denis*, 193.”

Indorsed,

“Payez à M. *Durant* valeur en compte. *Paris*, le 30 *Juillet* 1829.

“*P. Burillon*.

By the law of *France*, an indorsement in blank does not transfer any property in a bill of exchange: Held, that the holder of a bill drawn in *France*, and indorsed there in blank, cannot recover against the acceptor in the courts of this country.

30 L.R. 600.

8 new 546
3 L.R. 2. 13. 78: 79: 80: 83. 84
3 — 2 P. 539
4 — 2 B. 441.

L 4 15483

3 L.R. 2. 13.
4. 6 P. 9.

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“ Je garantis à M. *Durant* le protêt et la denonciation du present billet, comme s’il avait été fait, le dispensant de ces formalités. *Paris*, le deux *Janvier* 1830.

“ *P. Burillon*,

“ *P. Durant.*”

At the trial before *Bosanquet J.*, the Plaintiff produced the notes, which were on unstamped paper, and proved the handwriting of the respective parties, and the value of the notes in *English* currency.

The Defendant then called a witness, who stated himself to be an *avocat*, and that he had practised as such upwards of twenty years, and was then attached in that capacity to the *French* consulate in *London*; that he was conversant with the laws of *France*; that, by the law of *France*, a protest must always be made, and that no action could be maintained upon promissory notes and bills of exchange unless they were protested; that the indorsement to the Plaintiff being in blank, and not according to the formalities required by the Code de Commerce, articles 136, 137, 138., was invalid, and passed no interest to the holder. In support of that statement the articles in the Code de Commerce above referred to were read and translated to the jury: — By 136., “ La propriété d’une lettre de change se transmet par la voie de l’endossement; ” — 137., “ L’endossement est daté. Il exprime la valeur fournie. Il énonce le nom de celui à l’ordre de qui il est passé; ” — 138., “ Si l’endossement n’est pas conforme aux dispositions de l’article précédent, il n’opère pas le transport, il n’est qu’une procuration.”

It was also proved that, at the time the action was brought, the Defendant was domiciled and carried on business in *London*; but, at the time when the notes respectively were drawn and fell due, the maker and

indorser thereof were all resident in *France*, and *French* subjects.

The jury found, in reply to the enquiries of the learned Judge, that the Defendant was living in *France* at the time when the notes were drawn, and when they fell due; that *Durant*, the indorser, was also a resident in *Paris* at the same time; that according to the laws of *France* the indorsement was invalid, and that a protest was necessary. On that finding the learned Judge directed a verdict to be entered for the Defendant, reserving all questions of law: and such verdict was entered accordingly, with leave to move to enter a verdict for the Plaintiff on the points reserved.

Subsequently to the verdict, by leave of the Court, and with consent of the parties, it was given in evidence that the Plaintiff was in *England* when he received the bills.

In the following term *Taddy Serjt.* moved to set aside the verdict on the following grounds:—

First, That, admitting the law of *France* to be as stated, it could not govern the right of parties resident in *England*, the requisites of the code relied upon by the Defendant being merely municipal regulations.

Secondly, That the law of *France* was misrepresented by the Defendant's witnesses.

The Court, thereupon, granted a rule calling on the Defendant to shew cause why the verdict should not be entered for Plaintiff; or, why there should not be a new trial; and directed that before cause was shewn, the opinion of *French* advocates should be obtained, as to the law of *France* upon the points at issue.

Upon the rule coming on for argument, the Court directed the circumstances to be set forth in a special case; and that it should contain any opinions of *French* advocates which had been taken on either side up to that period.

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The opinion obtained by the Plaintiff as to the indorsement in blank, — the only point on which the Court pronounced judgment, — was as follows: —

“ This circumstance was no obstacle to Mr. *Trimbey's* right of action, for the 138th article of the Code de Commerce thus expressed, “ If the indorsement is not conformable to the requisition of the preceding article, it does not operate as a transfer of interest, but only as a procuration,” is only available on behalf of the party making the indorsement in blank against the immediate holder under such indorsement. If, however, the holder under an indorsement in blank does not proceed against the party immediately endorsing to him, but against the maker of the note, or against the parties who have made regular indorsements, neither the maker nor such parties can avail themselves of the provision of the 138th article of the code. Upon this point the jury has been completely led into error.

Paris, the 21st of May 1833.

Blanchet.”

An opinion had been obtained by the Defendant prior to the period when the rule *nisi* came on for argument, which, as to the indorsement in blank, was as follows: —

“ There is no doubt that, according to the *French* law, an indorsement in blank is insufficient to transmit regularly the property in a bill of exchange or promissory note. The Code de Commerce is precise on this point. Art. 137. says, ‘ The indorsement is dated; it expresses the value given for it, and states the name of him to whose order it is passed.’ The art. 138. adds, ‘ If the indorsement is not conformable to the preceding article, it does not operate as a transfer, — it is only a procuration.’

Paris, the 21st of October 1833.

Vervoort.”

The various authorities in the *French* law as to indorsement, which were relied upon in favour of the Defendant, are to be found in the Code de Commerce, arts. 136. to 139., and art. 110.

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The questions for the opinion of the Court were,—

First, If the correct construction of the terms of the Code de Commerce which apply to the circumstances in this action were such as to prevent the Plaintiff from enforcing payment against the Defendant in the courts of *France*, would the law of *France* govern the rights of the parties under the circumstances of this case?

Secondly, If the decision of this case were to depend upon the terms of the Code de Commerce, then the Court was to say how far the articles of the code relied upon by the Defendant applied to the circumstances of this case; and whether a correct construction had been put upon such articles by the evidence and opinions produced by the respective parties.

If the Court should be of opinion that, under the circumstances, the Plaintiff ought to have recovered, then a verdict was to be entered for him; if not, the verdict for the Defendant was to stand.

The case was argued in *Easter* term.

Taddy Serjt. for the Plaintiff. Admitting, for the sake of argument, that *Trimbey* could not have sued the Defendant in the *French* courts, because *Durant's* indorsement is not conformable to the 137th article of the Code de Commerce, he may, nevertheless, sue in the *English* courts, where an indorsement in blank operates as a complete transfer. The interpretation of a contract is governed by the law of the country in which the contract is made; but the judicial procedure applicable to it depends on the law of the country in which the action is brought. *Huberus de Conflictu*

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Legum, tit. 5. s. 7.: "Receptum est optimâ ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet *Sandius*, lib. 1. tit. 12. def. 5., ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci in quo fit executio, non ubi res judicata est:" *De la Vega v. Vianna* (a), *British Linen Company v. Drummond* (b), *Williams v. Jones* (c), *Wynne v. Jackson* (d), *Shaw v. Harvey* (e), *Doe v. Vardill* (g). And the objection taken on the part of the Defendant does not apply *ad valorem contractûs*, but *ad modum actionis instituendæ*.

Stephen Serjt. for the Defendant. The objection applies *ad valorem contractûs*, and not *ad modum actionis instituendæ*; for if the indorsement be not in conformity with the *French* code, no interest passess to the holder; and consequently there is no contract between him and the maker. To ascertain whether there be any contract or not between the parties, we must resort to the law of the country where the contract was made: *Lacon v. Higgins* (h), *Dalrymple v. Dalrymple*. (i) So, for the construction of the contract; *Talleyrand v. Boulanger* (k); and the right of action upon it; *Burrows v. Jemino* (l), *Ballantine v. Golding* (cited in *Smith v. Buchanan* (m), *Solomons v. Ross* (cited in *Folliott v. Ogden* (n), *Potter v. Brown* (o), *Clegg v. Levy*. (p) For the maker cannot be supposed to have contemplated that he would be subject to rights of action according to the law of *England*, and if the foreign law furnish the

(a) 1 *B. & Adol.* 284.

(b) 10 *B. & C.* 903.

(c) 13 *East*, 439.

(d) 2 *Russ.* 351.

(e) 1 *M. & M.* 527.

(g) 5 *B. & C.* 438.

(h) 1 *Dowl. & Ryland's Nisi*
Prius Cases, 38.

(i) 2 *Haggard's Rep.* 58.

(k) 3 *Ves. jun.* 447.

(l) 2 *Str.* 733.

(m) 1 *East*, 10.

(n) 1 *H. Bl.* 131.

(o) 5 *East*, 124.

(p) 3 *Campb.* 166.

rule on one point, it must also furnish it on the others : *Tenon v. Mars* (a), *Innes v. Dunlop*. (b) In *Shaw v. Harvey*, Lord *Tenterden* decided in effect that the contract was not a foreign contract. The *British Linen Company v. Drummond* is a decision on the statute of limitations which affects only *tempus et modum actionis* ; and *De la Vega v. Vianna* turned on the same distinction. The question, therefore, turns on the construction of the 137th and 138th articles of the Code de Commerce. Now the 138th article is express and without qualification, that an indorsement in blank does not operate as a transfer of the note ; and *Potier*, in his commentary on the article (4th vol. edit. *Dupin*, 1827), says, that the object of the law is to prevent fraud against the creditors of the indorser, and cites *Heineccius* to shew that an indorsement in blank passes no property. It is a mere procuration, and a procurator cannot sue.

Taddy in reply. *Pailliet, Manuel de Droit Français*, p. 1225. ss. 6. 8., in a note to article 138., gives a different view of the law of *France* as to a blank indorsement. “ L’accepteur ne peut se refuser au paiement d’une lettre de change, sous le prétexte que l’ordre est en blanc. Les endosseurs et leur créanciers sont les seuls qui puissent faire valoir ce moyen.”—“ L’endossement en blanc peut valoir autrement que comme procuration. Il peut valoir comme titre propre et personnel au porteur, s’il est constant que l’effet endossé en blanc fut remis au porteur avec l’intention de la saisir du titre ; par exemple, pour lui servir de garantie des valeurs qu’il aurait fournies au souscripteur de l’effet.”

If it can confer a title on the holder, why not a title to sue also ? for if the indorser can transfer the property, the indorsee must have the right to obtain it. But in-

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(a) 8 B. & C. 638.

(b) 8 T. R. 595.

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dorsement is a mere formality, and not of the essence of the contract, and therefore the mode of proceeding upon it must be determined by the law of the country in which the action is brought: *Huber*, p. 538. 540. *Dalrymple v. Dalrymple* was a case concerning marriage, which is a *status* and not a mere contract; and *Potter v. Brown* and most of the other cases cited for the Defendant, turned on the law of bankruptcy, in which the Courts here have always given effect to the regulations of other countries.

Curr. adv. vult.

TINDAL C. J. The point which has been reserved for consideration in this case is, whether the Plaintiff, under the circumstances stated in the special case, is entitled to maintain this action in an *English* court of law, in his own name? for, as to the several other objections which have been raised, the view which we have taken of the question above adverted to renders it unnecessary for us to give any opinion.

The promissory note was made by the Defendant in *France*; and it was indorsed in blank by the payee in that country; each of the parties, the maker and the payee, being at the respective times of making and indorsing the note domiciled in that country. The first enquiry therefore is, whether this action could have been maintained by the Plaintiff against the Defendant in the courts of law in *France*.

Upon this point of *French* law, the opinions of the foreign advocates which have been taken, by consent, since the trial of the cause, appear to be contradictory; but as each of them founds his opinion on the *Code de Commerce*, Arts. 137, 138., we feel ourselves at liberty to refer to the text of that code, in order to form our own judgment on the point; and upon reference thereto, we think the language of the code is clear and express, that an indorsement in blank, that is, without containing the

date, the consideration paid, or the name of the party to whose order it is passed, does not operate as a transfer of the note; it is but a procuration. And the language of the code being general, and unrestricted by any expressions which confine its operation to questions between the indorsee and the indorser of the note, we think, that if an action had been brought in any of the courts of law in *France* against the maker of the note, it would have been held not to be maintainable in the name of the Plaintiff, but that he should have sued in the name of the last indorser by procuration.

The question, therefore, becomes this. Supposing such rule to prevail in the *French* courts by the law of that country, is the same rule to be adopted by the *English* courts of law, when the action is brought here, the law of *England* applicable to the case of a note indorsed in blank in *England*, allowing the action to be brought in the name of the holder?

The rule which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this; that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractus*), the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). See *Huberi Prælectiones Civilis Juris*, tit. 3. *De Conflictu Legum*, sect. 7. This distinction has been clearly laid down and adopted in the late case of *De le Vega v. Vianna*. (a) See also the case of the *British Linen Company v. Drummond* (b), where the different authorities are brought together.

The question therefore is, whether the law of *France*,

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(b) 10 B. & C. 903.

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by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case it must be adopted by our courts, in the latter it may be altogether disregarded, and the suit commenced in the name of the present Plaintiff.

And we think the *French* law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point that there is no contract upon which the Plaintiff can sue. Indeed, the difference in the consequences that would follow, if the Plaintiff sues in his own name, or is compelled to use the name of the former indorser as the Plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences we think the law of *France* falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing.

We therefore think that our courts of law must take notice that the Plaintiff could have no right to sue in his own name upon the contract in the courts of the country where such contract was made; and that such being the case there, we must hold in our courts that he can have no right of suing here.

Judgment for the-Defendant.

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DOE dem. LAWFORD v. ROE.

June 9.

BY rule of this Court, of *Trinity* term 1680, 32 *Car. 2.*, judgment against the casual ejector ought to be moved for within the first four days of *Hilary* and *Trinity* term, and within one week of the first day of *Michaelmas* and *Easter* term.

E. V. Williams obtained a rule *nisi* for judgment against the casual ejector on the sixth day of this term, that being consistent with the practice in the other courts, and the unrepealed rule of *Car. 2.* being the only instance in which the practice of this Court differs from that of the King's Bench and Exchequer.

Watson shewed cause on an affidavit which disclosed that this ejectment was brought for a forfeiture, and that the lessor of the Plaintiff had commenced in the Court of King's Bench another ejectment for the same premises.

Williams contended that the lessor of the Plaintiff, having pursued the ordinary practice, and the tenant having incurred no inconvenience, the Court, in its discretion, would not strictly enforce the observance of a rule merely *juris positivi*, and almost obsolete.

Sed per Curiam. The tenant may have relied on the practice of this Court; and, having found no rule at the end of four days, may have dismissed the matter from his thoughts. In favour of a claim by forfeiture we

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cannot interpose with the established practice, although it is by an oversight that the rule of *Car. 2.* has not been repealed.

Rule discharged.

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IRELAND v. JOHNSON, VAUGHAN, and Others.

In case for an irregular distress, it is necessary to state correctly to whom the rent is due; and a variance in this respect is fatal.

CASE. The Plaintiff declared that the Defendants distrained the goods of the Plaintiff on the Plaintiff's premises, for and in the name of a distress for arrears of rent *due to the Defendants Johnson and Vaughan*, in respect of the premises, upon a demise of the same; Yet the Defendants, disregarding the statute in that behalf, and contriving to injure the Plaintiff, did not cause the goods to be appraised by two sworn appraisers, according to the form of the statute; but before they had been appraised wrongfully sold them.

Plea, not guilty. At the trial it appeared that the premises had been demised to the Plaintiff in *September 1892* by *Margaret Thom*, as committee of *Benjamin Burd*, a lunatic, and the warrant authorizing the distress was signed by *Johnson* and *Farquhar* as agents of *Margaret Thom*.

A verdict having been found for the Plaintiff, with leave for the Defendants to move to enter a nonsuit instead, on the ground, among other objections, of a variance in the description of the party to whom the rent was due; and

Spankie Serjt. having obtained a rule *nisi* accordingly,

Wilde Serjt. shewed cause. The gist of the action is the wrongful mode of conducting the distress; it is

impliedly admitted in the declaration that there was a right to make the distress, and it is immaterial to whom the rent was due; the allegation therefore that it was due to *Johnson* and *Vaughan* may be rejected as surplusage. [*Tindal* C. J. If you are not limited to the distress for the rent specified in the declaration, you might bring a second action.] The existence of the debt for rent arrear is mere matter of inducement to the wrong committed in the mode of levying the distress, and in matters of inducement a variance is immaterial; as in the introductory allegations of a declaration for a false return, or in actions against carriers for failing in their duty, and the like: *Stoddart v. Palmer* (a), *Phillips v. Shaw* (b), *Bromfield v. Jones* (c), *Frith v. Gray* (d), *Burbidge v. Jakes* (e), *Ditcham v. Chivis* (g), *Draper v. Garrett*. (h)

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Spankie and *Kelly* in support of the rule. The correct statement of the party to whom rent is due is material, and the foundation of the action. For if the statement be incorrect, — if rent be not due to the party named, — the action should have been trespass or replevin for distraining on behalf of one to whom no rent was due, and not case for a mere irregularity in the conduct of a distress rightful in its inception. In no instance in which the tenant has redress by replevin or trespass is it competent to him to sue in case for irregularities under the statutes of *Marlbridge* and 11 G. 2. c. 19, *Bradley on Distresses*, 276. In order therefore to sustain an action on the case for irregularities in the distress, the Plaintiff must begin by shewing that the distress was lawful in the first instance. Here the

(a) 3 B. & C. 2.

(b) 4 B. & Ald. 435.

(c) 4 B. & C. 330.

(d) 4 T. R. 561. note.

(e) 1 B. & P. 225.

(g) 4 Bingh. 706.

(h) 2 B. & C. 2.

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distress, if made for *Johnson* and *Vaughan*, as the declaration alleges, was unlawful in the first instance, the rent being due to *Margaret Thom*, and the Plaintiff, as against *Johnson* and *Vaughan*, should have replevied. It would have been a valid defence if the Defendants had pleaded that the distress was not made for rent due to *Johnson* and *Vaughan*. The cases referred to on behalf of the Plaintiff are decisions on variances chiefly of time or place, allegations as to which are seldom material. *Ditcham v. Chivis* turned on the vernacular meaning of the word *London*. But *Webb v. Hill* (a) is in point for the Defendants. There, in an action for a malicious arrest, it was held that the allegation that the Defendants "did not prosecute the suit complained of, but therein made default, and their pledges were in mercy, &c.," was not supported by proof of a discontinuance: and that such an error in the record could not be amended at *nisi prius* under 9 G. 4. c. 15., not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof.

TINDAL C. J. The question is, whether there is a material variance between the declaration and the evidence. The count on which the verdict has been taken states that a distress was made on the Plaintiff's goods for arrears of rent due to *Johnson* and *Vaughan* in respect of the premises occupied by the Plaintiff, upon a demise of the same; and then, that the Defendants conducted the distress irregularly.

This, therefore, is an allegation that the distress was for rent due to *Johnson* and *Vaughan* upon a demise by them: but instead of shewing a demise by them, the Plaintiff shewed a demise, either by the lunatic, *Burd*,

(a) 1 M. & M. 253.

or his committee, *Margaret Thom*: and the question is, whether this variance is material or not. In order to determine that, we must consider the nature of the action, and of the right out of the exercise of which the collateral injury arises.

The action is brought on the statute 11 G. 2. c. 19. s. 19., which, in order to prevent injury to the landlord by his becoming a trespasser *ab initio* for every trifling irregularity in the conduct of a distress, enacts, "Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab initio*; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover satisfaction for the special damage." The fair intendment of this is, that the rent must be due to the party who distrains as landlord. If it were not due, the tenant might sue in trespass, and need not have recourse to an action on the case on this statute. That this was the intention of the legislature appears from the statute 2 W. & M. c. 5. s. 5., which enacts, "That in case any such distress and sale as aforesaid shall be made by virtue or colour of this present act for rent pretended to be arrear and due, where in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid, that then the owner of such goods or chattels distrained and sold as aforesaid, his executors and administrators shall and may, by action of trespass or upon the case, to be brought against the person or persons so distraining, any or either of them, his or their executors or administrators, recover double the value of the goods or chattels so distrained and sold, to-

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gether with full costs of suit." The mode in which the rent becomes due, the party to whom it is due, and by whom the distress is made, are all material allegations, because, if the rent be not due, the tenant may sue in trespass.

Taking it up, however, as a question at common law, upon the pleadings, could there be any objection to the Defendants' singling out this particular allegation and taking issue upon it? and upon such an issue, in this case, the verdict must have been for the Defendants. Even under the new rules this is a point which the Defendants might have traversed. In the cases cited on the part of the Defendants the variances have chiefly been in allegations of time or place; allegations for the most part immaterial; and the question has always been, whether they were material or not. That brings us round to the enquiry whether the variance here is material, and it seems to be of the very essence of the Plaintiff's case. *Pool v. Court* (a) is in point. There the defendant's tenancy of land in *F.* at a certain rent was alleged as the consideration for his promise to manage it in a husband-like manner. The land for which the rent was reserved was in *F.* and *C.* That was held to be a fatal variance in stating the consideration of the promise. In that case it might have been urged that in assessing damages it was immaterial whether the land was in one parish or another; but it was held, that as part of the contract it ought to be accurately stated. *Morgan v. Edwards* (b) also comes near the present case.

GASELEE J. I am of the same opinion. The cases cited are mostly variances of place or time; and in *Ditcham v. Chivis* the Court would have held there had been a variance but for the act of the Defendant himself,

(a) 4 Taunt. 700.

(b) 2 Marsh. 96.

who had described his coach as a coach from *London to Blackheath*, though, in fact, it ran from *Westminster*. If in the present case the Defendants had pleaded, under the new rules, that there was no such demise and no such rent due as that alleged in the declaration, and the Plaintiff had demurred, could any one have contended that the allegation was immaterial, and improperly traversed?

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BOSANQUET J. I am of the same opinion. I should be glad to get over the difficulty, but it seems to me that the variance is in a material point. In an action of *tort* arising out of a contract the statement of the contract is often as material as in an action on the contract itself: so here, the variance is on a point which goes to the very essence of the action. The distress should be shewn to be in respect of rent from premises demised by the persons named in the declaration. It turns out that no rent was due to those persons, although the foundation of the action is abuse in distraining for rent alleged to be due to them. I think the variance cannot be got over, and the rule for entering a nonsuit must be absolute.

Rule absolute.

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Ex parte MARY GILL.

Under 3 &
4 W. 4. c. 74.
ss. 77. 91. a
feme covert,
when her
husband has
absconded,
and has not
been heard
of for some
time, may
pass a con-
tingent life
interest in
freehold pro-
perty.

UPON an affidavit that the husband of the applicant had absconded in 1831 after committing an act of bankruptcy; had never been heard of since, but was believed to be in *America*;

Bere obtained leave for the applicant to pass her contingent life interest in certain freehold property, pursuant to 3 & 4 W. 4. c. 74. ss. 91. 77., by which it is enacted, "That if a husband in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at *Westminster*, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done,

*the wife may not
contingent life
interest in
freehold pro-
perty.*

executed, or made by her, shall (but without prejudice to the rights of the husband, as then existing independently of this act) be as good and valid as they would have been if the husband had concurred."—"That after the 31st day of *December* 1833, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right may have in any lands of any tenure, or in such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, or unless the deed be acknowledged by her as hereinafter directed."

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AYLWIN, Administrator of DISMORR, v. TODD.

Where Plaintiff had been misled by Defendant as to the nature of a charterparty, the Court permitted Plaintiff to amend by striking out a count in covenant on a charterparty, and declaring for freight, not upon the charterparty:

And this, after many years had elapsed since the commencement of the action, the Defendant having been the cause of the delay.

IN 1815 *Dismorr* sued the Defendant in this Court, in covenant on a charterparty, entered into by the Defendant in *December* 1810 as freighter of the ship *Emma*, to recover 221*l.* 3*s.* 7*d.* freight, and 221*l.* 6*s.* 4*d.* primage, which the Defendant had failed to pay, notwithstanding the ship performed her voyage, and the cargo was duly delivered to him. The Defendant pleaded *non est factum* and several special pleas.

In *Hilary* term 1816 the Defendant filed a bill in Chancery against *Dismorr* for a discovery, and obtained an injunction to stay the action at law.

Various proceedings were had thereupon in Chancery till 1823, when *Dismorr* died.

In *February* 1825 the Plaintiff took out letters of administration to the effects of *Dismorr*. In *June* 1825 the Defendant filed a bill of revivor and supplement against the Plaintiff: the Plaintiff put in his answer; and in *February* 1826, the injunction to restrain proceedings at law was dissolved.

A few days afterwards the Plaintiff commenced the present action of covenant on the charterparty entered into by the Defendant to recover the freight and primage above mentioned.

In *June* 1826 the Defendant filed a supplemental bill in Chancery against the Plaintiff; and, in *November* 1826, obtained an injunction to restrain the Plaintiff from proceeding at law.

In *January* 1827 this injunction was dissolved. In *July* 1827 the Defendant obtained a commission for the examination of witnesses, upon which, however, he failed to proceed. After some negotiation,

The cause was referred to arbitration in *July* 1828.

In *January* 1829 the arbitrator died, before making his award, and the Defendant refused to agree to a new reference.

In *May* 1832 the Plaintiff gave a term's notice of intention to proceed in the action; and, in *Michaelmas* term 1832, delivered the issue with notice of trial, which he afterwards countermanded, because he could not find the charterparty on which he had declared.

In *Hilary* term 1833, the Plaintiff gave a rule for the Defendant to produce his witnesses in the suit instituted by the Defendant in Chancery in 1826. The Defendant failed to comply; and his bill was dismissed with costs in *July* 1833.

The Plaintiff, being unable to proceed to trial for want of the original charterparty, in *Hilary* term 1833 filed a bill of discovery in Chancery against the Defendant.

In *October* 1833, in his answer to this bill, the Defendant,—notwithstanding he had stated in his own bill, filed in 1816, that he had, in *December* 1810, entered into a charterparty under seal between *Dismorr*, master of the ship *Emma*, on behalf of the owners thereof, of one part, and himself, as freighter of the said ship, of the other part,—denied that he had ever entered into an agreement with *Dismorr* for freighting the said ship upon the terms to be contained in a charterparty, but admitted having in his possession the duplicate of a charterparty according to the form set out in the Plaintiff's declaration. He averred, however, that the date thereof and the name of *Dismorr* were on erasures; that he (Defendant) had originally executed a charterparty to one *Mackay* in *November* 1810, but that the owners of the *Emma*, having subsequently quarrelled with *Mackay*, erased his name and inserted that of *Dismorr*, substituting also the date of *December*

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1810 for *November* 1810. And that Defendant never re-executed the charterparty after the alterations were made.

It was clear, however, that he had acted on it; and, in the course of the protracted litigation since 1815, he had never disclosed these facts to the Plaintiff.

Under these circumstances,

Wilde Serjt. obtained a rule *nisi* to amend, by striking out the count upon the charterparty, and declaring for freight not upon the charterparty; the Defendant having been the occasion of the delay, and having, by the allegations in his bill in chancery in 1816, misled the Plaintiff as to the effect of the charterparty.

Atcherley Serjt. and *Henderson*, who shewed cause, contended that what was prayed was not an amendment, but the substitution of a different cause and different form of action, by which the Defendant's answer to the original claim might be unfairly rendered unavailing. Such an application had never been made, except in *Billing v. Flight* (a), on very peculiar grounds. But at all events, the Plaintiff should have applied earlier; *Green v. Mitton* (b), *Steel v. Sowerby*. (c)

Wilde observed that the defence on the merits would remain as before; and there was no affidavit that the Defendant had lost any witness in the time that had elapsed.

TINDAL C. J., after recapitulating the facts, said, the case stood on its own peculiar grounds, and would form no precedent for any other not exactly similar; but that, the Defendant having been virtually the cause

(a) 6 *Taunt.* 419.

(b) 4 *B. & Adol.* 369.

(c) 6 *T. R.* 171.

of the delay, the amendment ought to be allowed on payment of costs, the Defendant having leave to plead *de novo*.

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The rest of the Court concurring, the rule was made
Absolute.

GILBERT and Others v. TOWNS.

June 12.

THIS was an action of debt on the statute of 2 & 3 Ed. 6. c. 13., for not setting out tithe of potatoes, and was tried at the last *Kingston* assizes before Lord *Lyndhurst*, when a verdict was given for the Plaintiffs for 18*l.*, being treble the agreed single value of the tithes.

The Plaintiffs were mortgagees in fee, in possession of the rectory of *Kingston-upon-Thames*; the Defendant was an occupier of lands in that division of the parish which is called *Norbiton*; and in the year 1833 grew about ten acres of potatoes in fields.

He contended that the tithe of potatoes, being a small tithe, was payable to the vicar of *Kingston-upon-Thames*, and not to the rector.

The evidence adduced by the Plaintiffs at the trial was,

1. Grants under the great seal of the 19th of *May* 1609, and 15th of *December* 1640, of the rectory of *Kingston-upon-Thames*, and all manner of tithes and other profits to the rectory belonging; in the first of which grants the rectory was described to have been parcel of the possessions of the late monastery or priory of *Merton*:

2. The Plaintiffs' title deeds, the earliest of which was dated the 9th of *July* 1737:

Notwithstanding an endowment of 1374, conferring all small tithes on a vicar, the Court refused to set aside a verdict finding the right to potatoes grown in fields to be in the rector, evidence having been adduced from which it might be presumed that, on good consideration, an alteration had been made in the endowment previously to the restraining statute of 13 Eds.

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The deed of 16th of *December* 1738 contained the following description of the premises, which was copied in all the subsequent title deeds: "All and singular the tithes of corn, grain, wheat, rye, barley, beans, peas, *potatoes*, tares, oats, French wheat, hay, wool, and lamb, and all and all manner of tithes of what nature or kind soever to the rectory of *Kingston-upon-Thames* aforesaid belonging or in anywise appertaining, coming, growing, renewing, happening, or increasing, and which at any time or times hereafter shall or may be coming, growing, renewing, happening, or increasing in *Norbiton*, *Surbiton*, *Comb*, *Hatche*, *Ham*, *Kew*, otherwise *Kayho*, *Petersham*, *Sheen*, otherwise *Richmond*, or elsewhere within the said parish of *Kingston-upon-Thames*, to the said rectory belonging or in anywise appertaining:"

3. An extract from the *Valor Ecclesiasticus* of 26 *Hen. 8.*, of so much as related to the vicarage of *Kingston-upon-Thames*, in the county of *Surrey*: "It values in tithes of geese, 4s.; pigs, 16s.; doves, 10d.; eggs, 8s. 4d.; hemp, 1s. 4d.; fruits, 2s.; gardens, 8s.; woods, 13s. 4d.; tiles, 4s.; personal tithes, otherwise privy tithes, 9l. 5s. 9d.; cows, 26s. 8d.; calves, 10s.; honey and wax, 2s.; osiers, 1s. 4d.; chickens, 1½d.:" the total value amounted to 54l. 13s. 3d.:

4. A copy from the court rolls of the first fruits in the Court of Exchequer at *Westminster*, of *Michaelmas* term, 3 *Eliz.*, which shewed that the vicar, instead of receiving 54l. 13s. 3d. from his vicarage, received only 25l. 5s. 10½d., and judgment of diminution was accordingly given:

5. An extract from the records of the First Fruits' Office of the return made by the bishop of *Winchester*, in pursuance of the act of 5 *Ann.* for discharging small livings from their first fruits and tenths, and all arrears thereof: from that return, which was dated the 28th of

Marsh, 7 Ann. (1707), it appeared that the clear improved yearly value of the vicarage of *Kingston* amounted to 94*l.* 7*s.*, and no more.

The Plaintiffs then proceeded to prove, by oral testimony, that as far back as living memory extended, the tithes of potatoes grown in *fields* had uniformly been paid to the rector, and the tithe of potatoes, and every thing else grown in *gardens*, to the vicar. The reputation in the parish was, that the rector followed the plough, and the vicar the spade.

The Defendant relied on an endowment of the vicarage of *Kingston* in 1374, by which the vicar was endowed of all the small tithes, except what were specially reserved to the prior and convent. "Also the said vicars may take the tithes of cows, calves, goats, kids, pigs, rabbits, and other wild animals of what kind soever; of fowls, doves, swans, peacocks, geese, ducks, and of other fowls of whatsoever kind; also of cheese, milk, and things made of milk; of bees, honey, wax, and eggs." "Also the said vicars may take the tithe of flax, hemp, and warrens wheresoever and whatsoever, arising through the whole parish of the church and chapels aforesaid; and of corn in gardens or curtilages of the said parish of the said church and chapels aforesaid, dug or hereafter to be dug with the foot; of herbs also, and of all other things growing in the same, which were not of the manors of the aforesaid prior and convent. And if it shall happen in time to come, that any gardens of the said parish shall be turned up or levelled, and the lands thereof tilled by the plough, then the said prior and convent shall wholly take and have the tithes of corn (*bladorum*) of such gardens and lands so ploughed up. And if it shall happen hereafter, that any arable lands which are not of the manors of the said prior and convent, shall be reduced to gardens, and dug with the foot,

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then the aforesaid vicars shall take and have the tithes of corn arising from such gardens for the time in which they shall be dug and tilled with the foot. Also the said vicars may take the tithes of feedings, pastures, and agistments of animals; of pannage, willows, and osiers; and of fallen wood for fire whatsoever, and of vines, and of the fruit of trees of every kind, wheresoever arising within the parish of the church aforesaid and the chapels aforesaid, except from the manors aforesaid. Also the said vicars may take all tithes whatsoever of lambs, wool, and hides, to the chapels of *Dytton*, *Mulesey*, and *Shene* arising, except from the animals of the said prior and convent at *Mulesey*; and except from the animals of the farmers of the same Religious as aforesaid."—"Also the said vicars may take *the small tithes whatsoever of custom or of right due throughout the whole parish* of the church of *Kingston* and the chapels aforesaid, *by any manner arising, and by whatsoever name distinguished*, those only excepted which are specially reserved to the said prior and convent."—"And the religious men, brother *Robert* of *Wyndesore*, the now prior, and his successors the priors and convent aforesaid, shall for ever take and have the great tithes of sheaves arising without the said gardens, and of hay, and living mortuaries, and the tithe of wool, and lambs, and hides, of the village of *Kingston* and *Norbilton*, *Sorbelton*, *Combe*, *Hertyngdon*, *Hatcke*, *Hamme*, *Petersham* and *La Hake* and *Berewell*, and all other tithes and profits, and ecclesiastical emoluments within the said parish arising, or to the said church and chapels belonging, as well those above reserved to the same religious men as whatsoever other things to the aforesaid now vicar, for him and his successors, vicars, and for his vicarage aforesaid, and for their portion in this behalf, are not above assigned, nor by the tenor of these presents are in any manner soever ordained, not con-

taining the same portion or appointment to the now vicar, and his successors, vicars of the aforesaid vicarage as aforesaid assigned or made."

The vicar's collector produced his collecting book, which was put in. The only items contained in that book were fruits, *gardens*, woods, cows, and osiers; all of which were named in the *Valor Ecclesiasticus*.

A verdict having been found for the Plaintiff,

Spankie Serjt. moved to set it aside as contrary to evidence, relying on the unqualified language of the endowment, which gave the vicar all small tithes whatever, and contending that no legal alteration of this endowment could have taken place subsequently to the restraining statute of the 13 *Eliz.*, and that potatoes, which are clearly small tithe, were not introduced into *England* till after that period.

Wilde Serjt. and *Platt*, who shewed cause, argued from the discrepancies between the *Valor Ecclesiasticus* of 1535, and the endowment, that some alteration had taken place in the endowment before the 26 *Henry* 8.; and from the rolls of the first fruits, that the vicar's receipts had diminished before the 3 *Eliz.* From these circumstances; from the fact that the rector had always enjoyed the tithe of potatoes in fields; from the provision in the endowment, that when gardens were subverted and cultivated by the plough, the prior should receive the tithes of the blades of gardens so ploughed; and from the reputation in the parish that the rector followed the plough, and the vicar the spade; it might be presumed, that, previously to the reign of *Elizabeth*, an agreement had been come to, on sufficient consideration, that all roots and vegetables grown in open fields, when cultivated by the plough, should go to the rector.

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Spankie and *Comyn* in support of the rule.

The enjoyment by the rector may have proceeded from mistake, as potatoes were long thought, erroneously, to be great tithes. If there were any such agreement as the Plaintiffs have supposed, it is incumbent on them to establish their case by producing it. The clear grant in the endowment to the vicar is not to be superseded by vague presumption, or by accidental discrepancies between the endowment and the *Valor Ecclesiasticus*.

(*Smith v. Wyatt* (a), *Clarke v. Stapler* (b), *Dorman v. Currey* (c), were incidentally referred to.)

Cur. adv. vult.

TINDAL C. J. The Plaintiffs in this case declared in debt upon the stat. 2 & 3 Ed. 6., as proprietors of the tithes of potatoes within the parish of *Kingston*, against the Defendant, an occupier of lands within the parish, for not setting out the tithes of potatoes grown by him within the parish. The jury found their verdict for the Plaintiffs, and a rule has been obtained for setting aside the verdict, as against the evidence in the cause. The question at the trial was, whether potatoes grown in a field, which field was under the plough, were rectorial or vicarial tithes, in the parish of *Kingston*: for if such tithes were rectorial, the Plaintiffs, as proprietors of the rectorial tithes, were entitled to recover.

On the part of the Defendant it was contended, that such tithes were vicarial, and the endowment of the vicar, made in the year 1874, by the prior and convent of *Merton*, was produced in evidence, by which, after a specific enumeration of the tithe of various articles with which the vicar is endowed, he "is endowed generally, with all small tithes whatever due by custom or right, arising through the whole parish of the church of

(a) 2 *Eagle & Younge*, 91.

(b) 2 *Eagle & Younge*, 212.

(c) 3 *Eagle & Younge*, 817.

Kingston, and of the chapelries aforesaid, except those only which are specially reserved to the prior and convent aforesaid;" and it was urged on the part of the Defendant, that as potatoes, whether sown in great or small quantities, whether in fields or gardens, are small tithes, the tithes of potatoes by the very terms of this endowment must belong to the vicar, not to the rector. Such is undoubtedly the construction of this instrument of endowment: but it is well established, that the original endowment may have been altered by a new and subsequent endowment made by all parties whose concurrence is necessary, before the restraining statutes. And again, that long and constant perception of tithes by the vicar not mentioned in the endowment, or the non-perception of any species of tithes which are mentioned therein, with evidence of their perception by the rector, will afford a sufficient ground for presumption by a jury, that such augmentation or alteration of the endowment has been made by some ancient and lawful or voluntary agreement. The law is so well known on this head, that it is unnecessary to cite any cases: the result being this; that such an alteration may be valid in point of law, but that the burthen of proving that it has taken place, in point of fact, in any particular case, is thrown upon the rector.

Now, it is argued by the Defendants, that no such agreement can be presumed, in point of law, in the present case; because such alteration, in order to be valid, must have taken place before the restraining act, 13 *Elix.*; and it is generally allowed, that potatoes were not known in *England*, or, at all events, not cultivated in open fields, prior to that time. To which objection, the answer that has been given, and which appears to me to be a sufficient answer, is, that although it may be reasonably admitted that such was the case, and consequently that no specific agreement relating to potatoes,

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by name, could have taken place before the statute of *Elizabeth*, still that such an agreement may have been made as to the class of tithe to which potatoes belong, as would include and govern the tithe of potatoes, when they were afterwards introduced. As, for instance, supposing an agreement took place before the statute of *Elizabeth*, upon sufficient consideration, that all roots and vegetables grown in open fields, when cultivated by the plough, should go to the rector, and when cultivated by the spade, should go to the vicar, such an agreement would be valid in law, and would clearly comprehend potatoes when they came into general use. The question, therefore, in the present case is, whether there was such a body of evidence laid before the jury at the trial, as to justify them in making the presumption which they have done, upon the very question submitted to them for their consideration. There is undoubtedly evidence on both sides; and perhaps if the verdict had gone the other way, we should not have interfered to disturb it: but undoubtedly there is so much evidence on the part of the rector, as to bring this case within the general principle upon which the Court acts, viz. not to disturb a verdict, unless it sees clearly that the verdict is wrong.

That *some* variation had taken place, and some alteration been made in the terms of the original endowment, in the interval between the date of the deed of endowment, and the passing of the restraining statute, is evident. The *Valor Ecclesiasticus*, which was made in the 26 *Hen. 8.* (1535), enumerates the various sources of profit to which the vicar of *Kingston* was entitled, at the time of such value being taken; and upon comparing them with the enumeration in the endowment, there is a considerable difference between the two. To advert to no other than two instances: the endowment gives to the vicar the tithe "*Sylvæ caduæ*;" the *Valor* omits it, and

gives him the tithe "*Boscorum*;" the former tithable of common right, the latter by custom only: again, by the endowment, the vicar was endowed with the tithe of wool, and lamb, and skins, in the chapels of *Ditton*, *Molescy*, and *Shene*; in the *Valor*, there is no mention of any such tithe as due to the vicar, in any part of the parish. Some alteration, therefore, though to what extent may be uncertain, must have taken place in the interval between the time of granting the original endowment, and the time of taking the *Valor*.

But there is one provision in the endowment well worthy of observation:—"That if it should happen in future that any gardens of the said parish should be subverted or levelled, and that the land of the same should be cultivated by the plough, then that the said prior and convent should receive and take all the tithes of the blades of whatever gardens and lands were so ploughed." Again, "that if it should happen afterwards, that any plough lands (not being of the manors of the said prior and convent) should be reduced to gardens, and dug by the foot, then the said vicar should have and take the tithes of blade arising from such gardens, during such times as they should be dug and cultivated by the foot." The word "*bladum*" appears clearly by another part of the endowment to comprehend rye, wheat, and mislen. This provision seems to point to a distinction between the tithe of the same article, when growing in fields under the plough, and when growing in gardens under the spade: that in the first case, it should belong to the rector; in the second, to the vicar; and when this is coupled with the reputation in the parish, that the rector followed the plough, and the vicar the spade, we think it furnishes a fair ground of support to the presumption which has been made by the jury in favour of the Plaintiffs.

Lastly, it was proved that the tithe of potatoes is

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mentioned in the deeds by which the great tithes have been conveyed from one rector to another, so early, at least, as the year 1738; and that such tithe has been included in leases of the tithes, under which leases the rent reserved by the lease has been paid. This fact is evidence of enjoyment on the part of the rector, whilst there is a total absence of any such evidence on the part of the vicar.

Upon this state of the evidence we cannot think ourselves warranted in sending the cause down to a new trial. The learned Judge has expressed no dissatisfaction with the verdict; and it cannot but be observed, that this decision will not bind the vicar as to the rest of the parish, if he thinks proper to try his right as to other lands within the same.

Rule discharged.

June 12.

HAWORTH v. HARDCASTLE and Others.

In case for invading Plaintiff's patent right to certain machinery for drying calicoes, &c., where the specification, after setting forth the mode in

CASE for invading the Plaintiff's patent right in "certain machinery or apparatus adapted to facilitate the operation of drying calicoes, muslins, linens, or other similar fabrics."

At the trial before *Tindal* C. J., it appeared that the method in which that operation was performed previously to 1823, when the patent was granted, and in which it is now commonly performed by those who have not obtained leave to use the patent machinery, or

which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery; a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the Court refused to set aside the verdict for the Plaintiff and enter a nonsuit.

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who are not infringing the right, is as follows, viz.: men are employed to pull down the wet calico into looped folds, which hang down from beneath the spaces between horizontal parallel cross rails (called staves), which staves are fixed in rows side by side across the interior of a building called a drying-house or stove, so as to form a horizontal plane or platform, like a floor, extending throughout such building. The building is usually made high enough to contain three such platforms, or floors, or rows of horizontal parallel cross rails, situated at such heights, one above another, that a man standing on one floor can readily reach up through the spaces between the staves above his head, in order to take hold of the two selvages of the wet calico which he has previously extended horizontally over and across the staves above his head; from these staves the wet calico is hung in looped folds, in order that it may be dried by the heat which is kept up within the building. The looped folds are formed by pulling down the calico from the staves over head by repeatedly taking hold of the two selvages and pulling them down nearly to the next floor of staves below, on which the man stands: during the act of thus pulling down the wet calico, it is all necessarily dragged across the staves upon which it has been placed: and by this mode a man can only hang up one piece of calico at a time, though the staves are usually made long enough for three or four pieces of calico to be hung side by side on the same staff: the length of the loops, too, which can be formed, is restricted to the height to which a full grown man can reach when standing on one floor to take hold of the calico extended on the staves above his head.

The patentee's specification described his method as follows:—"My invention consists in the application of certain machinery or apparatus adapted to perform the operation of hanging or suspending damp or wet

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calicoes, linens, or other similar fabrics (over a series of rails, or staves, situated in a stove or drying-house), for the purpose of drying the same: the said machinery being also adapted to perform the operation of taking down or removing the said calicoes, muslins, linens, or other similar fabrics (from off the said rails or staves), after they have been sufficiently dried: by means of which invention a considerable saving of labour and expense may be effected in the operation of drying. I construct the stove or drying-house in a manner nearly similar to that at present in use; and I arrange the rails or staves (over which the cloth or fabric is intended to be hung or suspended) near to the upper part of the stove or drying-house: I then construct a frame or carriage in such a manner as to be capable of moving freely upon guides or supports from one end of the drying-house to the other, the said carriage being situated immediately above the range of rails or staves, but so as not to bear upon them; this carriage is furnished with proper supports for receiving certain rollers or boxes, upon the circumference of which rollers or boxes the wet cloth or fabric has been previously wound. The carriage is also furnished with certain cylinders or drums, which are caused to revolve in such a manner as to draw or wind the wet cloth or fabric from off the aforesaid rollers or boxes in a regular manner: thus, if the frame or carriage, with its appendages, be slowly moved along upon its guides above the rails or staves at the same time that the wet cloth or fabric is in the act of being drawn off the circumference of the rollers or boxes by the operation of the revolving cylinders or drums before mentioned, the wet cloth or fabric will descend in the vacancies between the rails or staves, and will hang down in loops or folds, so as effectually to expose its surface to the action of the dry or heated air, and in order to suit the depth or height of the stove

or drying-house. The depth or length of the said loops or folds may be regulated or determined by the length of cloth or fabric which would be given out by the revolving cylinders or drums during the passage of the frame or carriage from one stave to the next. When the cloth or fabric has been hanging a sufficient length of time to become dry, it may be taken up again, or drawn off the rails or staves, and wound again upon the circumference of the rollers or boxes. This operation I perform by simply causing the frame or carriage, with its appendages of rollers and cylinders, to traverse slowly along the drying-house in the contrary direction to what it moved during the operation of hanging the cloth, at the same time that the cylinders or drums are caused to revolve in a suitable direction for taking or winding up the cloth or fabric upon the circumference of the rollers or boxes: by this means the dry cloth may be wound evenly upon the circumference of the rollers or boxes, and removed from the machine. In some situations I find it advisable to vary the mode of arrangement, by causing the rails or staves (over which the cloth or fabric is intended to be hung) to be connected together with chains or ropes, somewhat in the manner of a rope ladder, being connected by endless chains or ropes, with a train or wheels, or other well known machinery, so as to be moved slowly along upon guides from one end of the stove or drying-house to the other: in this last-mentioned arrangement the frame or carriage containing the revolving cylinders or drums for giving out and taking up the cloth remains stationary at one part of the stove or drying-house. The operation of this machinery would be similar to the one before described with the traversing carriage, for as the cylinders or drums are caused to revolve and give out the cloth or fabric at the same time that the chain of rails or staves were moving slowly beneath the cylinder or drum,

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the cloth or fabric would descend between the staves, and hang down in loops or folds, in a manner similar to the machine with the moving carriage."

This was followed by a detailed explanation of drawings and plans which accompanied the specification; and the specification concluded thus:—"I have now described fully one mode of carrying my invention into effect, and I do hereby declare, that I consider my claim of invention to extend to application of the machinery or apparatus as hereinbefore described, for the purpose of facilitating the operation of drying calicoes, muslins, or other similar fabrics; which machinery or apparatus is adapted by means of a revolving and traversing cylinder or cylinders, situated over a series of stationary rails or staves arranged in a stove or drying-house, in such a manner that the pieces of calico, muslins, linen, or other similar fabrics may be previously wound upon the circumference, and by the revolving and traversing motion of the aforesaid cylinder or cylinders over the stationary rails or staves, or otherwise by the revolving motion of the cylinder or cylinders, and the traversing movement of the rails or staves themselves, may be caused to descend in the spaces between the said rails or staves, and hang down in long loops or folds, in order to spread the pieces quickly and expose their surfaces, so as to facilitate the operation of drying the same; the said machinery or apparatus being also adapted to perform the operation of taking up or removing the said calicoes, muslins, linens, or other similar fabrics from off the said rails or staves, and winding or rolling them upon the circumference of a roller or rollers, so that they may be removed from the machine after being sufficiently dried; at the same time I must observe, that the form and proportion of the different parts may be varied according to the situation or discretion of the workman employed in constructing

the same ; the materials of which the same may be made may also be varied according to the circumstances of the case, without departing from the intent and object of my invention as above described and set forth."

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With respect to the novelty of the invention, the evidence was in some measure conflicting, and it appeared that the machine failed in taking up certain cloths stiffened with clay for deceptive purposes.

The learned Judge left it to the jury to say, whether the invention was new, and sufficiently described in the specification ; whether the machine could take cloth up for any useful purpose ; and whether the Defendants had been guilty of any infringement on the patent.

The jury found that the invention was new, and useful upon the whole ; that the specification was sufficient for a mechanic, properly instructed, to make a machine from ; that there had been an infringement on the patent ; but that the machine was not useful in some cases for taking up goods.

Upon this finding, a verdict was entered for the Plaintiff, with leave for the Defendants to move to set it aside and enter a nonsuit instead, on the ground that the jury had, by their special finding, negatived the usefulness of the invention to the full extent which the patent and specification held out ; and that the patentee had claimed in his specification the invention of the rails or bars over which the cloths were hung, or, at all events, the placing them in tiers, notwithstanding the use of such rails was common before. Accordingly,

Stephen Serjt., in *Hilary* term, moved to enter a nonsuit on those grounds, or to have a new trial on the ground that the verdict was against evidence, and that the jury had been misdirected on the point of the capability of the machine to take up cloth. They should have been directed to consider, whether it would take

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cloth up according to the description in the patent, not whether it would take up for any useful purpose. *Felton v. Greaves (a)*, *Turner v. Winter (b)*, *Bloxam v. Elsee (c)*, *Brunton v. Hawkes (d)*, *Rex v. Else (e)*, *Bovill v. Moore (g)*, *Campion v. Benyon (h)*, and *Macfarlane v. Price (i)*, were cited.

A rule *nisi* was granted on the three first grounds, and refused as to the alleged misdirection.

Wilde and Coleridge Serjts., who shewed cause, after examining the sufficiency of the evidence as to the novelty of the Plaintiff's invention, and the infraction of his patent by the Defendants, contended that the taking up cloths after the drying was not an essential part of the patent, which was for machinery adapted to facilitate the operation of drying only. But, even if it were an essential part of the patent, the finding of the jury was sufficient to sustain the verdict for the Plaintiff; for it might be inferred from the qualified expression that the machine was not useful for taking up in *some* cases, that it was useful for taking up *in general*; and a failure in a few instances would not vitiate the patent: *Crossley v. Beverley (k)*, *Jones v. Pearce (l)*. Besides, the validity of a patent did not altogether depend upon its immediate usefulness; for the profitable application of a mechanical discovery was often subsequent to invention: *Lewis v. Marling. (m)*

And, upon a reasonable construction of the specification, the Plaintiff did not, as the Defendants alleged, claim the rails as part of his invention; for, in the

- (a) 3 Carr. & P. 611.
- (b) 1 T. R. 602.
- (c) 6 B. & C. 169.
- (d) 4 B. & Ald. 541.
- (e) 11 East, 109. n.
- (g) 2 Marsh. 211.

- (h) 3 B. & B. 5.
- (i) 1 Starkie, N.P.C. 199.
- (k) 3 Carr. & P. 513.
- (l) Godson on Patents, supplement, p. 10.
- (m) 10 B. & C. 22.

language of the specification, "he constructs the drying-house in a manner nearly similar to those at present in use, and arranges *the* rails near the upper part of the said drying-house:" meaning, the rails at present in use.

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Stephen, in support of the rule, after enforcing his original objections, urged further that the patent was taken out for machinery, whereas the specification was for the application of machinery, or for a method only; but, upon this point, the Court gave no opinion.

Cur. adv. vult.

TINDAL C. J. This case has been brought before us upon a motion for a rule either to enter a nonsuit upon leave given for that purpose by the Judge at the trial, or for a new trial, on the ground of misdirection of the learned Judge who tried the cause, and also that the verdict of the jury had been given against the weight of the evidence. Upon the discussion which took place upon the original motion, the Court were satisfied that the direction of the learned Judge was right, and the rule was consequently granted upon the two remaining grounds only.

The motion for entering a nonsuit was grounded on two points: first, that the jury had, by their special finding, negatived the usefulness of the invention to the full extent of what the patent and specification had held out to the public; secondly, that the patentee had claimed, in his specification, the invention of the rails or staves over which the cloths were hung, or, at all events, the placing them in a tier at the upper part of the drying-room.

As to the finding of the jury, it was in these words:—"The jury find the invention is new, and useful upon the whole, and that the specification is sufficient for a

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mechanic, properly instructed, to make a machine, and that there has been an infringement of the patent; but they also find that the machine is not useful in some cases for taking up goods."

The specification must be admitted, as it appears to us, to describe the invention to be adapted to perform the operation of removing the calicoes and other cloths from off the rails or staves after they have been sufficiently dried. But we think we are not warranted in drawing so strict a conclusion from this finding of the jury as to hold that they have intended to negative, or that they have thereby negatived, that the machine was not useful, in the generality of the cases which occur for that purpose. After stating that the machine was useful on the whole, the expression that, *in some cases*, it is not useful to take up the cloths, appears to us to lead rather to the inference that, in the generality of cases, it is found useful. And if the jury think it useful in the general, because some cases occur in which it does not answer, we think it would be much too strong a conclusion to hold the patent void. How many cases occur, what proportion they bear to those in which the machine is useful, whether the instances in which it is found not to answer are to be referred to the species of cloth which are hung out, to the mode of dressing the cloths, to the thickness of them, or to any other cause distinct and different from the defective structure, or want of power in the machine, this finding of the jury gives us no information whatever. Upon such a finding, therefore, in a case where the jury have given their general verdict for the Plaintiff, we think that we should act with great hazard and precipitation if we were to hold that the Plaintiff ought to be nonsuited, upon the ground that his machine was altogether useless for one of the purposes described in his specification.

As to the second ground upon which the motion for

a nonsuit proceeded, we think, upon the fair construction of the specification itself, the patentee does not claim as part of his invention, either the rails or staves over which the calicoes and other cloths are to be hung, or the placing them at the upper part of the building. The use of rails and staves for this purpose was proved to have been so general before the granting of this patent, that it would be almost impossible, *a priori*, to suppose that the patentee intended to claim what he could not but know would have avoided his patent; and the express statement that he makes, "that he constructs the stove or drying-house in a manner nearly similar to those which are at present in use, and that he arranges the rails or staves on which the cloth or fabric is intended to be hung or suspended, near to the upper part of the said stove or drying-house," shews clearly that he is speaking of those rails or staves as of things then known and in common use, for he begins with describing the drying-house as *nearly similar* to those in common use; he gives no dimensions of the rails or staves; no exact position of them, nor any particular description by reference, as he invariably does when he comes to that part of the machinery which is peculiarly his own invention. There can be no rule of law which requires the Court to make any forced construction of the specification, so as to extend the claim of the patentee to a wider range than the facts would warrant; on the contrary, such construction ought to be made as will, consistently with the fair import of the language used, make the claim of invention co-extensive with the new discovery of the grantee of the patent. And we see no reason to believe that he intended under this specification to claim either the staves, or the position of the staves as to their height in the drying-house, as a part of his own new invention.

As to that part of the rule which relates to the grant-

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ing of a new trial on the ground of the former verdict being against evidence, this case comes before us under such peculiar circumstances, that unless we were thoroughly satisfied that the verdict was wrong, we hold that we ought not to interfere. The trial took place before a special jury, it occupied two days of close and laborious investigation; the questions whether the invention was new, and whether there was any infringement, were specifically and pointedly left to the jury; the jury found their verdict for the Plaintiff, which verdict, we are authorised to say, was entirely to the satisfaction of the learned Judge who presided at the trial. These circumstances alone would be sufficient in ordinary cases to induce the Court to refuse to interfere. But in addition to these strong grounds for the course we take on this occasion, it should be observed, that this is the case of a patent granted in the year 1823, having therefore now only three years longer to remain in force; and further, the Defendants, or some other persons have, since this action has been tried, procured a *scire facias* to be filed to avoid the patent. As this is a mode of trial in which the precise objections to the patent may be raised by the pleadings, and the questions made on the former trial may be carried by writ of error to a higher tribunal, we do not feel ourselves called upon, unless upon a much stronger case than the present, to take away from the Plaintiff the benefit of the verdict which the jury have given him. If this further proceeding by *scire facias* had not been instituted and now pending, we might have felt ourselves called upon to discuss and consider one objection advanced by the learned counsel for the Defendants; namely, that the patent is taken out for machinery, whereas the specification is made for the application of machinery, or for a method only. But as this objection as well as the others can receive a more solemn decision upon the occasion to which we have

adverted, we shall offer no opinion on it now; which we think we are the less called upon to do, on this occasion, as it was not an objection taken upon the trial of the cause before the jury, but for the first time raised when the Defendants were heard in support of their rule.

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Rule discharged.

END OF TRINITY TERM.

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IN THE HOUSE OF LORDS.

June 17.

SOLARTE and Others v. PALMER and Another.

A letter from the holder to the indorser of a bill threatening legal measures unless the bill be paid, does not amount to notice of dishonor of the bill by the acceptor.

THIS was an action by the holders against the indorsers of a bill of exchange for 683*l.*, drawn the 25th of April 1825 by *Joseph Keats* on, and accepted by, *Daniel, Jones, and Co.*, payable at *Williams, Burgess, and Co.*'s, eight months after date.

Payment having been refused by the acceptors when the bill became due, the attornies of the holders wrote to *Palmer and Bouch*, the indorsers, as follows:—

“Gentlemen,—A bill for 683*l.*, drawn by Mr. *Joseph Keats* upon Messrs. *Daniel, Jones, and Co.*, and bearing your indorsement, has been put into our hands by the assignees of Mr. *J. R. de Alzedo*, with directions to take legal measures for the recovery thereof, unless immediately paid to, Gentlemen, your obedient servants,

J. and S. Pearce.”

At the trial of the cause before Lord *Tenterden*, the only question was, whether this letter amounted to notice of the dishonour of the bill, without which notice the indorser would not be responsible. Upon that point Lord *Tenterden* felt himself bound at *Nisi Prius* by the decision in *Hartley v. Case (a)*, where it was held that a notice of the dishonour of a bill of exchange must contain an intimation that payment of the bill had been refused by the acceptor, and, therefore, that a letter merely containing a demand of payment was not a sufficient notice. However, observing that the sum was large and the question of importance, he suggested that the

(a) 4 B. & C. 339.

Defendant might tender a bill of exceptions, as the readiest mode of obtaining the opinion of the highest tribunal.

A bill of exceptions was tendered and sealed accordingly, and argued in the Court of Exchequer Chamber, when that Court unanimously confirmed the authority of *Hartley v. Case*, and held that a letter demanding payment and threatening proceedings at law did not amount to notice of the dishonour of a bill. See 7 *Bingh.* 530.

From this decision an appeal was made to the House of Lords; and, the Judges being summoned to hear the argument,

F. Pollock and *R. V. Richards*, for the Plaintiff, contended that too much weight had been ascribed in the Exchequer Chamber to the authority of *Hartley v. Case*, a decision which was at variance with the opinions and practice of all commercial men. There was no settled form prescribed for giving notice of the dishonour of a bill; and, when the holder threatened to proceed at law against the indorser unless the bill were paid, it was a necessary inference that the bill had been dishonoured. In *Tindal v. Brown* (a), *Buller J.* said that a notice of this sort "must import that the holder considers the indorser as liable, and expects payment from him." Such was the import of the Plaintiff's notice; and it was, therefore, a sufficient notice of dishonour: *Bayley on Bills*, 4th edit., 206.

Whately, for the Defendants, was stopped; and

PARK J. declared the unanimous opinion of the Judges present (b), that the letter of the Plaintiff's

(a) 1 T. R. 167.

(b) *Williams B.*, *Bolland B.*,
Alderson B., *Patterson J.*, *Taun-*

ton J., *Littledale J.*, *Vaughan J.*,
Gaselee J., *Park J.*

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attornies did not amount to notice of the dishonour of the bill, as such a notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonoured. The following day,

Lord BROUGHAM C. said the judgment of the Court below must be affirmed with costs not exceeding 350*l.*, on the ground that, after the decision of *Hartley v. Case*, and the sanction given to the authority of that decision by the unanimous judgment of the Court of Exchequer Chamber and the fifth edition of *Bayley on Bills*, the present case was too clear for an appeal.

Judgment affirmed.

IN THE HOUSE OF LORDS.

June 17.

RICKETS v. LEWIS.

The House of Lords will not receive from the agent of the Plaintiff in error, a petition to refer to the Judges the legal points in the case.

IN this case the Attorney-General appeared for the Defendant in error, when

The agent for the Plaintiff in error offered to present to the House a petition of the Plaintiff in error, that the House would refer it to the Judges, to consider the legal points in the case; but,

The Clerk of the House declaring that this petition was unprecedented,

On the prayer of the Attorney-General,

Judgment was affirmed.

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IN THE HOUSE OF LORDS.

In the Matter of the LONDON and WESTMINSTER Bank. June 20.

THE Judges being this day assembled in the House of Lords, pursuant to the following order of June 16th :—

“ Ordered by the lords spiritual and temporal, in parliament assembled, that the bill entitled ‘ An Act to enable the Company called the *London and Westminster Bank* to sue and be sued in the Name of one of the Directors or of the Trustees, or any of them, or of the Manager or Managers, or any of them, of the said Company,’ be taken into the consideration of the learned Judges on *Friday* next, on this question, ‘ Are the provisions of this bill inconsistent with the Bank of *England*’s rights, as secured to it under the following acts :— 5 *W. & M. c. 20.*, 8 & 9 *W. & M. c. 20.*, 6 *Ann. c. 22.*, 15 *G. 2. c. 13.*, 21 *G. 3. c. 60.*, 39 & 40 *G. 3. c. 28.*, and 3 & 4 *W. 4. c. 98.*?’ ”

The Judges declined to answer a question proposed to them by the House of Lords, in terms which rendered it doubtful whether it did not extend to the construction of a bill before the House.

Harrison, while arguing on the part of the Bank of *England*, was stopped by Lord *Wynford*, in the chair, the learned Judges having requested permission to retire for the purpose of conferring and considering whether they could with propriety answer the question put to them.

The Judges (a) then retired ; and, after an absence of about three quarters of an hour, returned, when

(a) The Judges present *Parke J.*, *Taunton J.*, *Patterson J.*, *Tindal C. J.*, *Park J.*, *son J.*, *Alderson B.*, *Bolland B.*, *Faughan J.*, *Littledale J.*, *J. Williams B.*

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TINDAL C. J. said: — His Majesty's Judges, after considering the question which has been proposed to them, find it proposed in terms which render it doubtful whether it is a question confined to the strict legal construction of existing acts of parliament; and they therefore, with great deference and respect to your Lordships, request to be excused from giving an answer.

The further consideration of the bill was then adjourned.

IN THE HOUSE OF LORDS.

June 25.

MARSH and Others, Plaintiffs in Error, v.
KEATING, Defendant in Error.

A stockholder, whose stock has been sold without his knowledge under a forged power of attorney, may sustain an action for money had and received against the party who holds the proceeds of the sale.

THIS action was brought in pursuance of an order of the Lord Chancellor, for the purpose of trying the question, whether the Defendants below and *Henry Fauntleroy* were, at and before the date and issuing forth of the commissions of bankrupt against them, and still are, indebted to the Plaintiff below in any and what sum of money. And by the order it was directed that an action should be brought by or in the name of *Ann Keating*, against *William Marsh*, *Josias Henry Stracey*, and *George Edward Graham*, in his Majesty's Court of King's Bench, for money had and received by the said bankrupts to and for the use of the said *Ann Keating*; and that a special verdict should be taken in such action by consent on a statement of facts to be settled in manner therein mentioned. And that the Defendants in the said action should consent to judgment being entered up in the said Court, and in the court of error, for the said Plaintiff, for the purpose of the same

1. J. K. 16.
1 Exch. 157.
31. Rev. 157.
6. Dr. 157.
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being carried by writ of error before the House of Lords.

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The question raised was, the right of Mrs. Keating to prove against the bankrupt estate of *Marsh and Co.*, a sum of money received by them on the sale of stock belonging to her, which stock was transferred by *Henry Faunieroy*, one of the bankrupts, under a forged power of attorney.

By the special verdict it was found that on the 10th of *October* 1819, there was standing in the books of the Governor and Company of the Bank of *England*, in the name of the Plaintiff, the sum of 12,000*l.* interest or share in the joint stock called reduced 3 per cent. annuities, transferable at the said Bank of *England*. That the accounts of the proprietors of the said stock are kept in certain books of the Governor and Company of the Bank of *England* called ledgers; that accounts are entered in the form of debtor and creditor accounts in the said ledgers of the whole amount of the said stock, in which accounts the sums either subscribed or transferred to individuals are stated as items to their credit on the one side of the account, and on the other side of the account they are debited with all sums transferred from their names; and that certain other books are kept by the Governor and Company of the Bank of *England*, in which are entered transfers of the said stock, from time to time, purporting to be signed by the parties transferring the same, or their attorney, lawfully authorised. That upon production of the transfer books, the clerks of the Governor and Company of the Bank of *England*, who keep the ledgers, enter the sums transferred to the credit of the persons to whom the transfers are made in the ledgers, by adding those sums to their accounts, if they already have any, or by opening new accounts with such persons, if they have not already any accounts in such ledgers. That no entries

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in the ledgers are made without the authority of the entries which are made in the transfer books: but that, upon the production of such entries in the transfer books, the entries are made in the ledgers immediately, without further enquiry as to the genuineness thereof. And that any person on whose account any sum of stock appears in such ledger, is permitted at any time, on application at the Bank of *England*, to transfer the same, or any part thereof, at his discretion. That the accounts are balanced twice a year, for the purpose of making out dividends; that the aggregate amount of the balances form the aggregate of the said stock; that such aggregate amount is transmitted half yearly to the Audit Office of the Exchequer, for the purpose of ascertaining the amount which will be wanted for dividends; and that the dividends are calculated on the balance so ascertained. That an account is also once a year transmitted to the Audit Office of the Exchequer, which contains the names of all persons who appear by the books kept at the Bank as aforesaid to be the proprietors of any part of the said annuities. That the dividends are paid twice a year to the holders of dividend warrants, which are made out from the ledgers in the names of the persons who appear by the ledgers to be entitled thereto.

That the within named *William Marsh* received the dividends which became due in respect of the said sum of 12,000*l.* in the said stock, in the month of *October* 1819, under and by virtue of a power of attorney dated the 7th of *June* 1803, from the within named Plaintiff to the said *William Marsh*, Sir *James Sibbald*, Baronet, *Josias Henry Stracey*, and *William Fauntleroy*, being the persons at the date thereof composing the firm of *Marsh, Sibbald, and Co.*, and paid them to the house of *Marsh and Co.*, bankers in *Berners Street*, to the account of the Plaintiff, who had a banking account with the said house.

That on the 29th of *December* 1819, an entry was made in one of the transfer books of the Governor and Company of the Bank of *England*, purporting to be a transfer, — under a power of attorney purporting to be granted by the Plaintiff to the said *William Marsh*, *Josias Henry Stracey*, *George Edward Graham*, and *Henry Fauntleroy*, the persons who, at the date thereof, composed the firm of *Marsh and Co.*, jointly, and each of them severally, — of 9000*l.* of the Plaintiff's interest or share in the said stock, unto *William Brackstone Tarbutt*, of the *Stock Exchange*, gentleman, his executors, administrators, or assigns.

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That the power of attorney under which the said entry was made was not executed by the Plaintiff, but that the signature to the said power of attorney, purporting to be the signature of the Plaintiff, was forged by the said *H. Fauntleroy*; that the said *H. Fauntleroy* had not any authority from the Plaintiff to make any such transfer; and that the Plaintiff did not ever authorise or request the Governor and Company to make any transfer of the said sum of 9000*l.* in the said stock, or any part thereof.

That in consequence of such entry in the transfer-book, an entry was made in one of the ledgers of the Governor and Company of the Bank of *England*, by which the Plaintiff was debited with the said sum of 9000*l.* reduced 3 per cent. annuities, and credit was given to the said *W. B. Tarbutt* for the sum of 9000*l.* in the said stock; and that from that time the Plaintiff ceased to have credit for the said sum of reduced 3 per cent. annuities in the said ledger.

That on or about the 11th of *January* 1820, the said *Marsh and Co.* purchased for the Plaintiff the sum of 3000*l.* reduced 3 per cent. annuities, and caused the same to be transferred to the Plaintiff, whereby there appeared the sum of 6000*l.* to the credit of the Plaintiff

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in the said ledgers kept at the Bank of *England*, and no more. That the said *W. Marsh* attended at the Bank of *England* in the month of *April* 1820, and duly received the dividend which became due on the said sum of 6000*l.* 3 per cent. reduced annuities, on the 5th of *April* 1820, and signed a receipt for the same, as the attorney of the Plaintiff.

That since the 29th of *December* 1819, very numerous transfers of reduced 3 per cent. annuities, of sums both great and small, had been made to and by the said *W. B. Tarbutt*, which had been debited and credited to him; and that in the books kept by the said Governor and Company the said sum of 9000*l.* reduced 3 per cent. annuities had become blended and mixed with other stocks standing in the said ledgers in the said *W. B. Tarbutt's* name, and in the said books appeared to have been transferred and assigned by him; that it was not possible to distinguish the account to the credit of which the said 9000*l.* reduced 3 per cent. annuities stood, which were so carried to the credit of the said *W. B. Tarbutt*, and debited to the Plaintiff as aforesaid; and that no dividend warrant had at any time since the said 29th of *December* 1819 been made out for or in respect of the dividends on the said 9000*l.* reduced 3 per cent. annuities in favour of the Plaintiff, either together with or apart from any other sum of stock, but that the dividend thereon had been ever since paid to other persons appearing on the said books to be the transferees thereof.

That the Plaintiff did not consent to, and had not any knowledge of the above entries or entry having been made in the books of the within-named Governor and Company.

That upon the 10th of *September* 1824, the said *H. Fauntleroy* was apprehended on a charge of forging letters of attorney for the transfer of certain other annuities in the Bank of *England*, and that the Go-

vernor and Company of the Bank of *England* undertook to prosecute the said *H. Fauntleroy*. That the Plaintiff informed the Governor and Company of the Bank of *England* of the forgery so committed as soon as the same came to her knowledge. That the said Governor and Company caused several indictments to be prepared against the said *H. Fauntleroy*, for forging letters of attorney for transfer of parts of the annuities transferable at the Bank of *England*; and that the said *H. Fauntleroy* was tried and convicted upon one of such indictments upon the 30th of *October* 1824, and executed on the 30th of *November* in the same year; but that neither the Plaintiff nor the said Governor and Company preferred any indictment against the said *H. Fauntleroy*, in respect of forgery of the power of attorney hereinbefore referred to.

That *Marsh* and Co. kept an account with *Martin, Stone, and Co.*, bankers in the city of *London*, in the usual way of a banker's account; and that a pass-book went from one house to the other from time to time, according to the usual practice between bankers. That *Marsh* and Co. kept a book called a house-book, in which corresponding entries to those in the pass-book ought to have been made; and that, in the due course of business, the pass-book and the house-book of *Marsh* and Co. ought to have corresponded. That the house-book was in constant use in the banking-house of *Marsh* and Co., and that the pass-book was frequently brought thither from the house of *Martin* and Co.; but that when it was at the banking-house of *Marsh* and Co., the said *H. Fauntleroy* kept the same generally locked up in his own desk. That the said *H. Fauntleroy* was permitted by the other bankers to conduct the greater part of the business of the said banking-house without their interference; that they reposed great confidence in the said *H. Fauntleroy*; and

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that the said *H. Fauntleroy* made very many false entries and omissions in the house-book, so that the same did not correspond with the pass-book in many instances. That the said *H. Fauntleroy* paid into the hands of *Martin* and Co., and drew out of their hands, considerable sums for his own individual use, which appear respectively in the pass-book, but not in the house-book, and also made very many false entries in the other books of the firm, without the knowledge and in fraud of his partners, to a large amount.

That on the 29th of *December* 1819 the said *H. Fauntleroy* ordered one *Thomas Butterfield Simpson*, a stock-broker, to sell out the sum of 9000*l.* reduced 3 per cent. annuities, described as standing in the books of the said Governor and Company of the Bank of *England* in the name of the Plaintiff; and that the said *T. B. Simpson* sold the same to the said *W. B. Tarbutt* for the sum of 6018*l.* 15*s.*, which sum he received from the said *W. B. Tarbutt*. That according to the course of business between the said *T. B. Simpson* and the said *Marsh, Stracey*, and Co., the said *T. B. Simpson* allowed the said *Marsh, Stracey*, and Co. one half of the usual commission when employed by them to effect sales; that upon the said sale he allowed one half of the commission; and that the said *T. B. Simpson* paid the sum of 6013*l.* 2*s.* 6*d.*, being the amount of the sum so received by him from the said *W. B. Tarbutt*, deducting one half of the usual commission, by a check payable to the said *Marsh* and Co. into the hands of Messrs. *Martin* and Co., to the account of *Marsh* and Co.; and the same was entered by them in their pass-book as "Cash per *Fauntleroy*," the name of *Fauntleroy* denoting the name of the individual by or on whose behalf the payment was made. That no entry was made, at any time, of the said sum of 6013*l.* 2*s.* 6*d.*, in the house-book, or any other books of *Marsh* and Co., but only in the

pass-book of that firm with *Martin* and Co.; that it was the business of the said *H. Fauntleroy*, as between himself and his co-partners, to have entered the said sum in the house-book, if it had been intended by him for the account of *Marsh* and Co. That among the books kept by the said *Marsh* and Co., there was, besides the said house-book, a daily balancing-book, purporting to contain a daily record of the amount of cash left in the drawers in *Berners Street*, and the amount of cash at *Martin* and Co.'s, as shewn by the said house-book, after the conclusion of each day's transactions, accompanied by a proof of the correctness of such balance. That the said *H. Fauntleroy* in general made up such daily balances in the said balancing-book, and the said sum of 601*l.* 2*s.* 6*d.* was not entered in the house-book, nor in the daily balancing-book, on the said 29th of *December* 1819, or at any other time, nor did the same ever come into the yearly balances of the said house of *Marsh* and Co., or in any other manner into their books.

That no individual partner of the house of *Marsh* and Co. could draw monies out of the said account of *Martin*, *Stone*, and Co. but by drafts signed in the partnership name or firm; but that the said *H. Fauntleroy* paid in, and by means of such drafts drew out, large sums of money for his own individual purposes; and that the account between the said *Marsh* and Co. and *Martin* and Co. was repeatedly balanced between the said 29th of *December* 1819, and the bankruptcy of *Marsh* and Co.

That on the 13th of *September*, in the year 1824, in consequence of the discovery of the forgeries of the said *H. Fauntleroy*, the said *William Marsh*, *Josias Henry Stracey*, and *George Edward Graham*, became bankrupts; and a commission of bankruptcy, bearing date the 16th of the same month, was duly awarded and issued against them, under which they were duly

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found and declared bankrupts; and on the 26th of *October* following, the said *H. Fauntleroy* also became bankrupt, and a commission of bankruptcy, bearing date the 29th of the same month, was duly awarded and issued against the said *H. Fauntleroy*, under which he was on the same day duly found and declared bankrupt.

That, in the month of *April* 1820, credit was given to the Plaintiff by the said house of *Marsh* and Co. in the banking account kept by the Plaintiff with the said house, for the dividend on the sum of 15,000*l.* reduced 3 per cent. annuities, 9000*l.* stock, parcel thereof, being the 9000*l.* reduced annuities before mentioned, the entries respecting the said dividends being made by the said *H. Fauntleroy*, or under his immediate direction; and that from the month of *April* 1820, up to the date of the said bankruptcy, entries were made in the books of *Marsh* and Co., by which the Plaintiff's account was credited with a sum of money as the dividends on the reduced 3 per cent. annuities then in her name, including in such account the dividends on the said 9000*l.* reduced 3 per cent. annuities, as if those dividends had been regularly received from time to time, such entries respecting the said dividends having likewise been made by the said *H. Fauntleroy*, or under his immediate directions; and that until after the apprehension of the said *H. Fauntleroy* before mentioned, the said *William Marsh*, *Josias Henry Stracey*, and *George Edward Graham*, and each of them, were wholly ignorant of the said forgery hereinbefore mentioned.

That after the bankruptcy the Plaintiff made application to the Governor and Company of the Bank of *England*, respecting the said sum of 9000*l.* interest, or share in the said stock called reduced 3 per cent. annuities, and that thereupon the following letter was

written by the attornies of the Governor and Company of the Bank of *England* to the within named Plaintiff:—

“ *New Bank Buildings, 4th Dec. 1824.*

“ The Governor and Directors of the Bank of *England* have had under their consideration your claim to have 9000*l.* reduced 3 per cent. annuities, which formerly stood in your name, replaced. They find, upon enquiry, that the stock in question was sold and transferred in your name by one of the partners of the late firm of *Marsh, Stracey, and Co.*, and that the produce of the stock was paid into the funds of Messrs. *Marsh, Strucey, and Co.*; you have, therefore, as the Bank is advised, a right to prove the amount received on your account, and to receive a dividend upon that proof under Messrs. *Marsh, Stracey, and Co.*’s commission. And we are directed by the Governor and Directors to request that such proof may be tendered and enforced by petition, if it should not be admitted by the commissioners; after which the bank will be ready to replace the amount of your stock so sold, upon having an assignment of your proof; and the dividends on the stock so replaced, which accrued subsequent to the latest period at which they were credited to you by Messrs. *Marsh, Stracey, and Co.*, will also be paid to you.

“ We beg to add, that we are ready to afford you information and assistance as to the evidence by which your right to prove will be established.

“ *Mrs. Keating.* *Freshfield and Kaye.*”

That on the 1st of *August* 1825 the Governor and Company of the Bank of *England* paid the Plaintiff the sum of 270*l.*, on her signing and entering into the following receipt and agreement:—

“ *August* 1, 1825. Received of the Governor and Company of the Bank of *England* the sum of 270*l.*, being the amount which would have been payable to me by way of dividend on 9000*l.* reduced 3 per cent. an-

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nunities, heretofore standing in my name, for the two half years ending the 10th day of *October* and 5th day of *April* last, if that stock had not been transferred, as I allege it to have been, without any legal authority from me.

“ I say, received the same, without prejudice to any right I may have to prove for the produce of the said stock under *Marsh* and Co.’s commission, or my right to claim to have the said stock replaced by the said Governor and Company. And I do hereby engage (in case the said debts should be decided by a court of law to be provable against the said bankrupt’s estate), when required by the said Governor and Company, and at their expense, to tender or cause to be tendered a proof to the commissioners under the bankruptcy of *Marsh* and Co., in respect of the produce of such stocks so sold out by them ; and in case such proof shall be rejected, to permit my name to be used in a petition to be presented by and at the expense of the said Governor and Company to the Court of Chancery, for the purpose of enforcing their acceptance of such proof as a debt against the said bankrupts’ estate, on being indemnified by the said Governor and Company from all costs, charges, and expenses which I may sustain or be put to in respect thereof, without prejudice to my right to claim, notwithstanding such proof, to have the said stock replaced in my name by them.

Ann Keating.”

That the Plaintiff being examined before the commissioners of bankrupt under the commission awarded and issued against the said *Marsh* and Co., entered into and signed, by her agent thereunto lawfully authorised, the admission following, that is to say : —

“ *In the Matter of Marsh and Co. ex parte Ann Keating.*

The said *Ann Keating* hereby admits that the paper writing, bearing date the 22d of *December* 1819,

and purporting to be a power of attorney from her to *William Marsh, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham*, referred to in the examination of *James Penn* before the commissioners on the 18th of *September* last, and the 4th of *June* instant, and exhibited to the commissioners, was not executed by her, or by her authority, but is forged and fraudulent. That she discovered such forgery at or about the time of the apprehension of *Henry Fauntleroy* in *September* 1824, and gave information thereof to the Governor and Company of the Bank of *England*, but did not institute any criminal proceedings against any person in respect of such forgery; and further, that she the said *Ann Keating* has demanded from the said Governor and Company the full amount of stock in respect of which the present claim is made, and all dividends thereon, and that she intends to insist upon such demand, and to enforce the same by law, if necessary, and that 135*l.* is the amount of the half-yearly payment of the said annuity, and that she has received the said sum of 135*l.* half-yearly from the Bank of *England*, from the time of *Marsh* and Co.'s bankruptcy down to the present time, upon signing a receipt and undertaking (as above set out).

And the said *Ann Keating* further admits that this claim is prosecuted by, and for the benefit, and at the expense of the Bank of *England*; and that whether the same shall fail or be established, she insists upon her demand against the Bank of *England*, as above stated."

In *Easter* term, 1832, judgment was entered up in the Court of King's Bench, without argument, for the Plaintiff, and a writ of error being thereupon brought into the Court of Exchequer Chamber, the judgment of the King's Bench was also, without argument, affirmed in that Court, the object of the parties being to bring

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the matter in issue before the ultimate court of appeal without delay; and thereupon the Defendants below accordingly brought their writ of error in parliament, and assigned general errors. The Plaintiff below joined in the error.

The Defendants below contended, that the judgment of the Court of King's Bench, and the judgment of affirmance by the Court of Exchequer Chamber, ought to be reversed.

First, Because Mrs. *Keating* was still the proprietor of the 9000*l.* stock. She could not be deprived of her property in the stock by the wrongful acts of other persons, without her knowledge or consent. The statutes which create and define the nature of the stock also prescribe the only mode in which it can be legally transferred, and that mode had not, in the present case, been adopted; Mrs. *Keating's* rights were therefore untouched, and her property in the stock was not divested. No fraud or mistake of the government, or its agents, could change the right of a stockholder, from a right to a parliamentary annuity into an action of damages against the government, or the bank, or any other party whatsoever

Secondly, If it should be contended that Mrs. *Keating* might elect to affirm the act of transfer, by subsequent recognition, although it was originally done without her authority, the answer was, that no such affirmance had taken place. To entitle her to rely on a subsequent recognition, that fact should have been found. And although she might affirm an act done in her name but without her authority, as against the party doing the act, no such right could be exercised against third persons. A lease under a power, void for non-observance of the conditions of the power, or a lease under the enabling statutes, void for non-observance of the requisites of those statutes, could not be set up or

confirmed by any act of the lessor. The felonious act of *Fauntleroy* could not be made valid by affirmance against parties innocent and not cognizant of the felony: nor was it competent for the Plaintiff below to maintain any action, either against *Fauntleroy* or any person deriving through him, for restitution of the property divested by the felony, or any compensation or damages in respect of the felonious act, without having prosecuted the felon.

Thirdly, This action being for money had and received, could not be maintained against *Marsh* and Co., who never did, in fact, receive the money, nor was there any constructive receipt of it by any entry in their books, or acknowledgment to the party claiming it. Besides, *Mrs. Keating* by her agreement with the Bank of *England* had disaffirmed the sale of the stock, and could not now set it up as a valid sale. Further, this was an equitable action, and the Bank of *England*, being the real claimants, could not enforce against *Marsh* and Co. a claim which arose only by means of their own negligence; no negligence was found in *Marsh* and Co., but even if there were negligence on both sides, the parties were *in pari delicto*, and the rule, *potior est conditio possidentis*, applied.

For the Plaintiff below it was contended, that whatever might be the abstract right of proprietors of interests in the public funds to continue such till they should have assigned those interests; yet, in the present case, *Mrs. Keating's* title in the bank books had been destroyed, and her stock had been so dealt with by means of entries in those books, the public records of title, not only that other persons had got into possession of the dividends, but that it could not now be ascertained to whose account the same had been placed, so that it had become impossible to restore it to her in specie; and though

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she might possibly be entitled to maintain an action against the Bank of *England*, that would not give her her stock, but damages. Neither the bank nor the government could create stock. If, therefore, the stock of a public creditor was transferred from his name, and was so dealt with that it could not be ascertained in whose name or names the various portions of the specified stock now stood, no means existed to recover that which could no longer be identified. *Stone v. Marsh* (a), *Ex parte Bolland in re Marsh and Others* (b), *Stracey v. The Bank of England*. (c)

And the stock in question having been sold by order of one of the partners of the house of *Marsh and Co.*, who were *Mrs. Keating's* bankers, and her agents in regard to that stock, and the produce having been paid to the said house, they were liable in an action for money had and received to account to her for the sum so received.

PARK J. now delivered the opinion of the Judges as follows : —

The question which your Lordships have been pleased to propose for the opinion of His Majesty's Judges amounts in substance to this; whether the produce of stock formerly standing in the name of *Mrs. Ann Keating*, the Plaintiff below, but transferred out of her name on the 29th of *December* 1819, without her authority, and under a power of attorney which had been forged by one of the partners of the Defendants below, the bankers of *Mrs. Keating*, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by

(a) 6 B. & C. 551.

(b) 1 Montagu & M. 315.

(c) 6 Bligh. 754.

the surviving partners to the use of the Plaintiff below, and be recovered by her in that form of action. And after hearing the argument at your Lordships' bar, and consideration of the facts stated in the special verdict, all the Judges who were present at the argument, including the Lord Chief Justice of the Common Pleas, who is absent at *Nisi Prius*, and Mr. Baron Bayley, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

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The first objection raised against the Plaintiff's right to recover, and upon which great reliance has been placed at your Lordships' bar, is an objection which, if allowed to prevail, would be equally strong against the Plaintiff's right to recover damages in any form of action, and against any person. It is objected that the Plaintiff below has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only, viz., "by entries in the transfer-books kept at the bank," which entry, it is enacted, "shall be signed by the parties making such transfers, or their attornies, authorised by writing under their hand and seal," and that no other method of transferring stock shall be good. Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer-book kept at the bank not having been signed by the party making the transfer, nor by any attorney authorised by writing under her hand and seal, it is contended that it is altogether inoperative; that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of *Davis v. The*

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cited and relied upon as an authority directly in point in support of such proposition. But we hold it to be altogether unnecessary, on the present occasion, to discuss the proposition above advanced, or the authority of the case cited in support of it; for although the proposition may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty, still, under the circumstances stated in the special verdict, we are of opinion that the Plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the Defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or, more properly, impracticability, under which *Mrs. Keating* would be placed, if, as matters now remain, she should elect either to receive the dividends or to sell her stock: it is sufficient to observe, that the special verdict finds, "that when stock is sold, an entry of the transfer is made in the bank books, and the name of the purchaser substituted for that of the seller. The dividend warrants are thenceforth made out in the purchaser's name, who receives the dividend, and the seller's name is no further noticed." Now it is obvious that a transfer, under a forged power, or by an impostor, has all the appearance, and, unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer: the transferee's name is entered in the bank books as the stockholder; the dividend warrants are made

(a) 2 Bingham 393.

out in his name; and he, as holder of the warrant, has the right to insist upon the payment of the dividends; and in this particular case, the special verdict finds, "that it is not possible to distinguish the accounts, to the credit of which the Plaintiff's stock, so sold under the power of attorney, now stands." If the Plaintiff below, therefore, were to apply to receive payment of the dividends, or to sell the stock, she would be met with a difficulty, insuperable in fact: although the stock may, in contemplation of law, still be vested in her, it is certain that she could not either receive the dividend or sell the stock, until she had first compelled the bank to purchase, *de novo*, in her name, an equal quantity of the same stock.

Is she compelled to adopt this circuitous process, or is she at liberty to abandon all further concern with her stock, and to consider the price which was paid by the purchaser for that which was her stock, to be her money, and to follow it into the hands of the present Defendants below?

This, as before stated, appears to us to be the question reserved for our consideration; and, upon this question, we think her at liberty to give up the pursuit of the stock itself, and to have recourse to the price received for it, unless any of the objections which have been urged at your Lordships' bar should be allowed to be available under the particular circumstances of this case.

The general proposition, that where a party who has been injured has different remedies against different persons, he may elect which of them he will pursue, is not called in question. If the goods of *A.* are wrongfully taken and sold, it is not disputed that the owners may bring trover against the wrong-doer, or may elect to consider him as his agent, may adopt the sale, and

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maintain an action for the price; but it is objected, that such general rule will not apply to the present case, on various grounds of objection which have been advanced on the part of the Defendants in the action.

Those objections appear to resolve themselves substantially into four: first, it has been urged that the transfer in this case being an act, not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it: Secondly, that, at all events, in this case such election is taken away, upon grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action would, in effect, be to affirm a sale completed through a felony, and would give the Plaintiff a right of action, arising immediately out of the felony itself: Thirdly, that it does not appear, from the facts found in the special verdict, that the money produced by the sale of the stock came to the hands of the present Defendants under such circumstances as would constitute it money had and received by the Defendants below to the use of the Plaintiff: and, lastly, that by the subsequent transactions between the Plaintiff and the Bank of *England*, she has lost any right of action against the Defendants, if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It is urged at the bar, that a lease under a power being void, on account of a non-compliance with the terms of the power, or a lease under the enabling statutes being void, on account of the non-observance of the requisites contained in those acts, such void lease cannot be set up or confirmed by any act of the lessor; but these instances only prove that acts done to confirm the lease itself are nugatory, and that the estate of the lessee remains precisely the

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same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her, whether the right of the transferee to hold the stock is strengthened or not. She is looking only to the right of recovering the purchase money; and if, in seeking to recover that, she does not, by her election, make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the interest of the purchaser of the stock is so far collaterally and incidentally strengthened, that, after recovering the price for which it was sold, she would effectually be stopped from seeking any remedy against, or questioning, in any manner, the title of the purchaser of the stock.

As to the second objection it may be admitted, that the civil remedy is, in all cases, suspended by a felony, where the act complained of, which would otherwise have given a right of action to the Plaintiff, is a felonious act. Upon this ground, Mrs. *Keating* would have lost any right of action, which she could otherwise have had against *Fauntleroy* for the wrongful sale of her stock, without her authority, by reason of the felony committed by him as the means of selling the stock. But this principle does not apply to the present case, upon two grounds:—First, None of the present Defendants had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them, in which the civil right arising against them, supposing it to exist, can merge or be suspended; they are innocent third persons. And, secondly, *Fauntleroy*, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought, not indeed for the commission of this particular forgery, but of another of the same nature; and the present

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Plaintiff having given to the bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar, *Dawkes v. Coveleigh* (a), and *Crosby v. Leng*. (b) As to the argument, that to affirm this sale is to affirm a felony, that point may be considered to have been decided in the cause of *Stone and Another v. Marsh and Others* (c), with which decision we entirely concur. Lord *Tenterden*, in giving the judgment of the Court of King's Bench in that case, puts the question, in page 565. of that report, in so clear a point of view, that it will be better to transcribe his words:—"It was contended that the maxim of ratifying a precedent unauthorised act, and taking the benefit of it, cannot apply to a void or felonious act, and that here the Plaintiffs were seeking to ratify the felonious act of *Faulstich*, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the Defendant's argument. The assertion is incorrect in fact; the Plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of *England* to allow the transfer to be made." We think, therefore, upon the reasons above given, that this second objection falls to the ground.

(a) *Style's Rep.* 347.

(b) *12 East*, 409.

(c) *6 B. & C.* 551.

But it is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the Defendants, so as to be money received by them to the use of the Plaintiff; and the consideration of this objection involves two questions: — First, did the money actually come into the possession of the Defendants? Secondly, if it ever was in their possession, had the Defendants the means of knowledge, whilst it remained in their hands, that it was the money of the Plaintiff, and not the money of *Fauntleroy*. As to the first point, the special verdict finds expressly that *Simpson*, the broker, paid the sum of 6013*l.* 2*s.* 6*d.*, being the amount of the sum received from *Tarbutt* (deducting one half of the usual commission), by a check payable to *Marsh* and Co. into the hands of *Martin* and Co. to the account of *Marsh* and Co., at the precise time of such payment; therefore there can be no doubt but that it was as much money under their control as any other money paid in at *Martin* and Co.'s by any customer under ordinary circumstances. The house of *Marsh* and Co. might have drawn the whole of the balance into their own hands: if the same money had been paid into *Martin* and Co.'s as the produce of the Plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the Defendants to the use of the Plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as "Cash per *Fauntleroy*," or because it never appeared in the house-book, or any other books of *Marsh* and Co., but only in the pass-book of that firm with *Martin* and Co., or because it never came into the yearly balancing of the house of *Marsh* and Co., or in any other manner into their books. Those several circumstances prove no more than that *Fauntleroy*, one of the partners, deceived the others, by preventing the money

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from being ultimately brought to the account of the house ; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner *Faumilleroy*, in the subsequent appropriation of the money, affords no answer after it has once been in their power ; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged, that the present Defendants had no knowledge that the money was the property of the Plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale, into their account at *Martin and Co.'s*.

It must be admitted that they were so far imposed upon by the acts of their partner, as to be ignorant that the sum above mentioned was the produce of the Plaintiff's stock ; but it is equally clear that the Defendants might have discovered the payment of the money and the source from which it was derived, if they had used the ordinary diligence of men of business.

If they had not the actual knowledge, they had all the means of knowledge ; and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the Plaintiff's right to recover, it is argued, that by the agreement into which she entered with the bank, and under which she has received, from the time of the sale, the dividends which would have become due, she has disaffirmed the sale, with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale.

But it appears to us, that it is sufficient to look at the terms of such agreement to give an answer to the objec-

tion. That agreement expressly reserves to Mrs. *Keating* the right to have recourse, either to the bank or the present Defendants for her remedy, as she may be advised. It therefore leaves the question, whether the sale is affirmed or not, completely in uncertainty, until she makes her election to have recourse to the one or the other; and the agreement is one which causes no disadvantage to the rights of the Defendants, who, if liable, can only be liable once to the payment of the money actually received, whether the bank have in the mean time advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your Lordships, *A.* has the right to recover the produce of her stock against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires to have it expressly understood that he fully concurs in the opinion now delivered.

Judgment affirmed, without costs.

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IN THE HOUSE OF LORDS.

June 25. The Mayor and Burgesses of *LYME REGIS* v.
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Where the crown granted a borough in fee farm to a corporation, and acquitted them of a part of the rent, willing that they should repair the banks, mounds, sea-shores, and pier within the same, Held, that an action lay against the corporation at the suit of an individual, whose house had been injured by the sea in consequence of the neglect of the corporation to repair the sea-shore and mounds.

THIS action was brought by *Henley*, the Plaintiff below, against the Defendants below, for the non-performance of certain repairs directed by their charter, whereby special damage had been incurred from the sea; and the declaration in the first count stated that

Whereas heretofore, and before the committing of the grievances by the said Defendants, as hereinafter next mentioned, to wit, on the 20th of *June*, in the 10th year of the reign of our late sovereign *Charles I.*, to wit, at the parish of *Lyme Regis*, in the county of *Dorset*, our said late sovereign lord, by his certain letters patent, duly sealed in that behalf, after reciting as therein is recited, did for himself, his heirs, and successors (amongst other things) give, grant, and confirm to the mayor and burgesses of *Lyme Regis* aforesaid, and their successors, the borough or town of *Lyme Regis*, and also all that the building called the pier-quay or cob of *Lyme Regis*, with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the said pier-quay or cob, in any wise howsoever belonging or appertaining; to have, hold, and enjoy the aforesaid borough or town, and also all that the building aforesaid, called the pier-quay or cob of *Lyme Regis*, with all and singular the liberties, franchises, privileges, and immunities, to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, to the only and proper use and behoof of the said mayor and burgesses of the borough aforesaid, and their successors,

8. C. 23.

4. H. 145.
1. H. 145.

3. 76 y. 170.
7. 100 y. 170.
1. 2

in fee farm for ever, yielding of fee farm to our said late sovereign lord *Charles I.*, his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned: And our said late sovereign lord *Charles I.* did further, for himself, his heirs, and successors, pardon, remise, and release to the same mayor and burgesses of the borough or town aforesaid, and their successors for ever, twenty-seven marks, parcel of thirty-two marks of the farm of the same borough and the liberties thereof, anciently by letters patent, or in any other manner due to our said late lord king *Charles I.*; willing not that the same mayor and burgesses of the borough of *Lyme Regis* aforesaid, in the county of *Dorset* aforesaid, or their successors, or either or any of them, should be charged of the further portion of the aforesaid farm of thirty-two marks, besides the aforesaid five marks, by our said late lord king *Charles I.*, or by his heirs, justices, sheriffs, escheators, clerks of the market, or bailiffs or ministers of him, the late king *Charles I.*, his heirs or successors whomsoever, or of the arrears thereof; but that they and their successors, against our said late king *Charles I.*, his heirs and successors, should be thereafter acquitted, and from time to time for ever discharged of the aforesaid yearly twenty-seven marks, parcel of the aforesaid yearly thirty-two marks, any statute, act, ordinance, provision, or any charters or letters patent theretofore made, by any of our said late king *Charles I.*'s progenitors to the same mayor and burgesses, or their predecessors, to the contrary thereof in any wise notwithstanding; *And that the aforesaid mayor and burgesses of the borough of Lyme aforesaid, and their successors, all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in any wise belonging or*

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of *LYME*
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Charter of
10 Car. 1. set
out in the de-
claration with
grant of the
borough of
Lyme to the
mayor and
burgesses:
Remitter of
27 marks,
parcel of
the farm of
the borough;
and provision
as to repairs of
the buildings,
banks, sea-
shores, and
mounds, to the
borough
belonging.

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and Burgesses
of LYME
REGIS
a.
HENLEY.

Mayor to be
clerk of the
market.

Grant of fines,
&c. of the
market.

appertaining, or situate between the same borough and the sea, and also the said building there called the pier-quay or the cob, at their own costs and expenses thenceforth, from time to time for ever, should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient: And further, our said late king Charles I., by the said letters patent, for himself, his heirs and successors, did grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the same borough for the time being for ever thereafter should be clerk of the market within the borough or town aforesaid, and the liberties and precincts of the same; and that the mayor of the borough aforesaid for the time being should do and execute, and might and should be able to do and execute there for ever, all that to the office of clerk of the market of our said late king Charles I.'s household there pertained to be done and performed; so, nevertheless, that the clerk of the market of our said late king Charles I.'s household for the time being, together with the aforesaid mayor for the time being, might exercise the office abovesaid, and intromit, when he would to do any thing which pertained to the office of clerk of the market there, in the borough aforesaid, and the liberties and precincts of the same: And further, our said late king Charles I., for himself and his heirs and successors, did, by the said letters patent, give and grant to the said mayor and burgesses of the said borough and town aforesaid and their successors, all and singular the fines, amerciaments, and sums of money before the said clerk of the market of the town or borough aforesaid, or the clerk of the market of the said late king Charles I., or his deputy, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters patent, forfeited, or thereafter to be forfeited

and assessed in the same borough; to have and enjoy to the same mayor and burgesses of the borough aforesaid, and their successors, to the use of the aforesaid mayor and burgesses, and their successors for ever, of the said late king *Charles I.*'s gift, without account, or any other thing for the same to our said late king *Charles I.*, his heirs or successors, in any wise howsoever to be rendered or paid, and to be levied by their own servants and ministers, without estreats thereof to be sent to the Exchequer of the said late king *Charles I.*: And, moreover, the said late king *Charles I.* did will, and by the said letters patent did for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, *full power, authority, and licence from time to time for ever to dig stones and rocks in any places whatsoever, within the borough and parish of the town aforesaid, out of the sea and on the sea-shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier-quay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid:* And the said late king *Charles I.* did also, by the said letters patent, will and grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the same mayor and burgesses and their successors should have, hold, use, and enjoy, and might and should be able fully, freely, and entirely to have, hold, use, and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances, and licences aforesaid, according to the tenor and effect of the said letters patent, without the let or impediment of the said late king *Charles I.*, his heirs or successors whomsoever, our said late king *Charles I.* willing not

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HENLEY.
Without ac-
count.

Licence to dig
stones and
rocks within
the borough
and parish of
the town out
of the sea, and
on the sea-
shore, &c. for
reparation of
cob, and com-
mon works.

To enjoy with-
out let or im-
pediment of
the king.

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and Burgesses
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And not be in
any thing dis-
turbed by him
or his heirs,
&c.

Declaration
alleges accept-
ance of char-
ter;

and from
thence the en-
joyment of all
the benefits,
profits, and
advantages.

Plaintiff below
in possession
of messuages,
&c. in the
borough, before
and at the
time of griev-
ances;

and entitled
in reversion to
others then in
the occupation
of his tenants;

that the same mayor and burgesses and inhabitants of the borough or town aforesaid, or either or any of them, by reason of the premises, or either or any of them, should be thereof hindered, molested, aggrieved, or vexed, or in any thing disturbed by him, the said late king *Charles I.*, or by his heirs, or his or their justices, sheriffs, escheators, or other the bailiffs or ministers of the said late king *Charles I.*, his heirs or successors whomsoever:

Which said letters patent the mayor and burgesses of the borough aforesaid, afterwards, to wit, on the same day and year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, duly accepted, and the same thence hitherto have been, and still are, one of the governing charters of the said borough, to wit, at the parish aforesaid, in the county aforesaid. And the said Plaintiff further says that the said mayor and burgesses, from the time of their acceptance of the said letters patent, hitherto, have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by such letters patent as aforesaid.

And whereas, also, before and at the time of the committing of the grievances by the said Defendants, as hereinafter next mentioned, the said Plaintiff was lawfully possessed of and in divers messuages, buildings, and closes of land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid; And whereas, also, before and at the time of the committing of the grievances by the said Defendants, as hereinafter next mentioned, divers other messuages, buildings, and closes of other land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid, were in the possession and occupation of divers persons, as tenants thereof respectively to the said Plaintiff, the

reversion thereof then and still belonging to the said Plaintiff, to wit, at the parish aforesaid, in the county aforesaid, all which said several messuages, cottages, buildings, and closes of land, with the appurtenances, before and at the times of the committing of the several grievances by the said Defendants, as hereinafter next mentioned, were abutting on or near the sea-shore there, to wit, at the parish aforesaid, in the county aforesaid; and whereas, also, before and at the time of sealing of the said letters patent, and acceptance thereof, as aforesaid, by the said mayor and burgesses, and also at the time of the committing of the several grievances by the said Defendants, as hereinafter next mentioned, divers buildings, banks, sea-shores, and mounds, had been, and were then respectively standing and being within the borough of *Lyme Regis* aforesaid; and divers other buildings, other banks, other sea-shores, and other mounds, had been and respectively were belonging and appertaining to the said borough; and divers other buildings, other banks, other sea-shores, and other mounds, had been and were at those times respectively standing and being and situate between the said borough and the sea, to wit, in the borough aforesaid; all which said buildings, banks, sea-shores, and mounds respectively, at the times of the committing of the several grievances by the said Defendants, as hereinafter next mentioned, were near to, and then and there constituted and formed, and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, buildings, and closes of land, with the appurtenances aforesaid, and then and there hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing in, upon, against, or over the said several mes-

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all then
abutting on
or near the
sea-shore :

and before, and
at the sealing
of charter and
acceptance,
and of griev-
ance, divers
buildings, &c.
were standing
within
borough,
others were
belonging to
borough, and

others were
standing be-
tween borough
and sea,

all which at the
times of griev-
ance were and
still ought to
be a protection
to said mes-
suages from
the sea.

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HENLEY.

Alleged lia-
bility of De-
fendants below
to repair
buildings, &c.

as often as
necessary or
expedient, so
as to prevent
damage to said
messuages by
sea.

Grievance,

That to injure
Plaintiff below,

Defendants
below, on 1st of
January, 1821,

permitted said
buildings, &c.
to be ruinous ;

suages, buildings, and closes of land aforesaid ; and all which buildings, banks, sea-shores, and mounds, the said Defendants, at the times of the committing of the several grievances by them, as hereinafter next mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof, as aforesaid, liable, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable, and ought, at their own proper costs and charges, well and sufficiently to repair, maintain, and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, buildings, and closes of the said Plaintiff, by the sea, or the waves or waters thereof, to wit, at the parish aforesaid, in the county aforesaid :

Yet the said Defendants, well knowing the premises, and not regarding the said letters patent, nor their duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure, prejudice, and aggrieve the said Plaintiff, and to deprive him of the use and benefit of his several messuages, buildings, and closes in this count first above-mentioned, and also to injure, prejudice, and aggrieve him, the said Plaintiff, in his reversionary interest of and in the said messuages, buildings, and closes, in this count secondly above-mentioned, so being in the possession and occupation of the said persons, as tenants thereof to him, the said Plaintiff, as aforesaid, and in which he, the said Plaintiff, was so interested, as aforesaid, heretofore, to wit, on the 1st of *January* 1821, and from thence for a long space of time, to wit, continually until the commencement of this suit, to wit, at the parish aforesaid, in the county aforesaid, wrongfully and unjustly suffered and permitted the

said buildings, banks, sea-shores, and mounds, to be and continue, and the same, during all the time aforesaid, were ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper, and necessary repairing, maintaining, and supporting of the same, to wit, at the parish aforesaid, in the county aforesaid: by means of which said several premises, the sea, and the waves and waters thereof, afterwards, to wit, on the same 1st of *January* 1821, and on divers other days and times between that day and the commencement of this suit, to wit, at the parish aforesaid, in the county aforesaid, ran and flowed with great force and violence in, upon, under, over, and against the said several messuages, buildings, and closes of the said Plaintiff, and in which he was so interested, as aforesaid, and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages and buildings, and the materials of the same messuages and buildings, together with divers cart-loads of the earth and soil, and divers acres of the said several closes, were washed and carried away, to wit, at the parish aforesaid, in the county aforesaid: by means of which said several premises, the said Plaintiff not only lost and was deprived of the use, benefit, and enjoyment of his said messuages, buildings, and closes in this count first above mentioned, but was also thereby then and there greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said several messuages, buildings, and closes in this count secondly above mentioned, so being in the possession and occupation of the said persons, as tenants thereof to the said Plaintiff as aforesaid, and in which the said Plaintiff was so interested as aforesaid: And the said Plaintiff hath been and is, by means of the premises aforesaid,

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whereby the
sea damaged
said messuages,
&c.

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otherwise greatly injured and damnified, to wit, at the parish aforesaid, in the county aforesaid.

There were other counts stating a liability to the same repairs by prescription; and others, stating it by reason of the possession of certain closes. The Defendants below pleaded the general issue.

The cause came on to be tried before *Littledale J.* at the Spring assizes for the county of *Dorset*, in 1828, when the jury found a verdict for the Plaintiff below, on the first count of the declaration, with 100*l.* damages, and were discharged from giving any verdict upon the other counts.

In *Easter* term 1828, a motion in arrest of judgment was made in the Court of Common Pleas, but judgment was given for the Plaintiff below. See 5 *Bingh.* 91.

The Defendants below thereupon brought a writ of error in the Court of King's Bench, where the judgment of the Court of Common Pleas was affirmed. See 3 *B. & Adol.* 77.

Upon that judgment the present writ of error was brought; on the ground,

1. That no liability, by reason of tenure, was created by the charter of *Charles I.*, nor is any alleged in the pleading: *Rex v. Kerrison.* (a)

2. That there is no authority for the liability here claimed; the cases cited by the Court of King's Bench, in giving judgment in this case, relating to liabilities by reason of prescription; *Paine v. Partrich* (b); or of tenure; 12 *Hen.* 7. fol. 18.; or of acts of parliament; *Rex v. Inhabitants of Kent* (c), *Rex v. Inhabitants of Lindsey* (d), *Rex v. Kerrison* (e); or of nuisances to public rights; *Rex v. Stoughton* (g); and not to any liability arising from the acceptance of a grant from the king.

(a) 1 *M. & S.* 435.

(b) *Carth.* 191.

(c) 13 *East*, 220.

(d) 14 *East*, 317.

(e) 3 *M. & S.* 526.

(g) 2 *Saund.* 157.

3. That the remedies for the non-performance of such repairs as are directed by the charter of *Charles I.* are pointed out by the act of 43 *Eliz. c. 4.*, and by numerous authorities, to be either a suit in the Court of Chancery, to compel a proper application of the funds granted, or a proceeding on the part of the king for a forfeiture of the franchise. 4 *Viner*, 476., and the cases there collected. *Com. Dig. Franchises*, Y. 3.

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4. That the occupiers of lands abutting on the sea are primarily liable to protect them from the sea; and the liability of the Defendants below to protect the Plaintiff below from the sea, if any such exists, arises from the agreement implied from their acceptance of the charter of *Charles I.* But no agreement to become liable to do that for which others are primarily liable will subject a party to an indictment, though the party be a corporation aggregate, and though a sufficient consideration for the agreement be shown, and though the public interest is concerned; *Rex v. Mayor of Liverpool* (a); nor will such agreement release those in whom such primary liability exists; *Regina v. Duchess of Buccleuch*. (b) The liability of the Defendants below to an indictment for non-performance of the repairs in question, is assumed, in the judgment of the Court of King's Bench, as the ground on which the right of action for special damage rests.

5. That it appears by the statute 1 G. 4. c. 99., for improving and maintaining the harbour pier or cob at the port and borough of *Lyme Regis*, that the funds granted by the charter are inadequate to the repairs directed: it seems, therefore, absurd to suppose that any private prosecutor or plaintiff should be able to compel the application of the funds granted by the king for public purposes, to repairs beneficial to himself

(a) 3 *East*, 86.

(b) 1 *Salk*. 358.

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individually, while repairs required for the general protection of the town and port are left undone. If the remedies mentioned in the third reason were adopted, the application of the funds granted according to the intention of the king in granting them, would be a defence.

For the Plaintiff below it was contended, that every breach of public duty or neglect of what the party is bound to perform, working wrong or loss to another, is injurious and actionable: *Sutton v. Johnstone (a)*, *Russell v. Men of Devon (b)*.

On this principle is founded the right of action against sheriffs, justices, constables, &c.; against a keeper of records; *Herbert v. Paget (c)*; against a ferryman, for neglecting to keep his boat; *Payne v. Partridge (d)*, *Churchman v. Tunstal (e)*; and against a corporation for not repairing a creek of the sea; *Mayor of Lynn v. Turner. (g)* By the charter granted to the Defendants below, the king *wills* that the Plaintiffs shall repair the sea walls; they accept the charter, and by their acceptance the words of the king enure as a covenant by the Defendants below: *Bret's case. (h)* They neglect their duty, by which the Plaintiff below sustains serious loss, and this gives him a right of action against them.

The duty imposed on the Defendants below affects the public interest, and the charter is granted in exercise of the royal prerogative, and is not like the indenture of subjects.

The Defendants below are also liable by reasons of their tenure of the town or borough: *Callis*, p. 117.

(a) 1 T. R. 493.

(b) 2 T. R. 667.

(c) 1 Lev. Rep. 64.

(d) Show. 255. Carth. 191.

(e) Hardres, 162.

(g) Cowp. Rep. 86.

(h) Cro. Jac. 399.

They are also liable by reason of their possession of the walls themselves : *Callis*, p. 115.

The declaration sufficiently alleges both these liabilities, and does not aver an obligation more extensive than the duty required by the charter.

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The opinion of the Judges was now delivered by

PARK J. The question proposed by your Lordships for the opinion of the Judges is as follows :—

The declaration in an action on the case against a corporation states, that before the committing of the grievances by the Defendants, the king, by his letters patent duly sealed, did give, grant, and confirm to the corporation and their successors the borough or town of *Lyme Regis*, also all that the building called the pier-quay or cob of *Lyme Regis*, with the liberties, franchises, privileges, and immunities to the same town, pier-quay or cob, in any wise belonging, to the only proper use and behoof of the corporation, in fee farm for ever, yielding of fee farm to the king, as in the letters patent mentioned ; and that the king thereby released to the corporation part of an ancient farm of a sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier-quay, or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient. That the king also by the same charter granted fines and amerciaments before the clerk of the market without account, and a licence to dig stones within the borough

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and parish of the town, out of the sea and on the sea-shore, for the reparation and amendment of the port, and the said pier-quay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid. The declaration then avers that the charter was duly accepted, and from thence hath been and still is a governing charter of the borough, and that the corporation from the time of that acceptance hitherto have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by the said letters patent. It then proceeds to state that the Plaintiff was, at the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit, in the said borough, which were before and at those times abutting on or near the sea-shore. That a building, bank, and sea-shore within the borough, a building, bank, or sea-shore belonging and appertaining to the borough, and a building, bank, or sea-shore situate between the borough and sea, all which were there at the time of the sealing and acceptance of the letters patent, and at the time of the committing of the grievances, and at the last-mentioned time, were near to, and constituted and formed, and were a protection and safeguard, and still of right ought to be so, to the Plaintiff's messuage and land aforesaid, and then hindered the sea from flowing upon and over that messuage and land; and which buildings, banks, sea-shores, and mounds, the Defendants were at those times, by virtue of the said letters patent and acceptance, liable to repair at their own proper costs and charges, as often as it might be necessary or expedient to do so.

A breach is then assigned that the corporation wrongfully permitted the said buildings, banks, sea-shores, and mounds, to be out of repair, for want of due, proper, and necessary repairing of the same, by means of which

the Plaintiff's house and land was inundated and injured.

After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the Plaintiff against the corporation?

In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair; thirdly, that the place in question is out of repair; and lastly, that the Plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair.

The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict.

The doubt in this case arises upon the first and second requisites. With regard to the first, it is argued that the corporation have not by acceptance of the charter stated in the declaration incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the king's will that they shall repair.

Looking at the words of the charter, as stated in this declaration, we are of opinion that it does cast upon the corporation an obligation to repair; which they, by accepting the charter, have adopted. The king grants and confirms to the corporation the town or borough and pier, with the liberties, franchises, privileges, and immunities to the same belonging, in fee farm for ever, yielding of fee farm to the king as therein mentioned; and the king remits part of an ancient rent, willing that the corporation should be thereof acquitted; and then the charter goes on in these words, "And that the

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corporation and their successors, all and singular, of the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier-quay or the cob, at their own costs and expenses thenceforth from time to time for ever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient."

Now these words are undoubtedly an expression of the king's will that the corporation should repair; but they are not the less a condition on that account: on the contrary, they show the consideration for the grant, the motive inducing the king to make the grant, and consequently the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another it is not necessary to determine: such a grant between subjects is matter of contract and bargain, strictly so speaking; but a grant from the king to a subject is matter of favour, and the language used will be found to vary accordingly. Independently of authorities we should have come to this conclusion, but the case of *Bret v. Cumberland* (a) seems to us to be decisive of the question. That was an action of covenant by the assignee of king *James I.* against the executors of the lessee of a mill under letters patent of queen *Elizabeth*, sealed with her seal only, and containing these words: — "Et prædictus *Willielmus* executores et assignati sui prædictum molendinum et domus et ædificia inde sufficienter reparabunt." The first question was, whether these words in the letters patent, to which the queen's seal only was affixed, shall enure as a

(a) *Cro. Jac.* 521.

covenant to bind the lessee and his assigns ; and it was resolved "that it should, for the lessee takes thereby, because it is matter of record : although in show they are the words of the lessor only, yet he accepting thereof and enjoying it, it is as well his covenant in fact, and shall bind him as strongly as if it had been a covenant by indenture." So in the charter in question, the words are in show the words of the king only, but the corporation having accepted the charter and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

The second requisite is, in truth, that upon which this case wholly turns ; viz., that the obligation must be matter of so general and public concern that an indictment will lie for the breach of it. Now this depends principally upon the construction which ought to be put upon the words of the charter. They are undoubtedly of a very general nature,—“All and singular the buildings, banks, sea-shores, and all other mounds and ditches within the said borough, or to the said borough belonging, or situate between the said borough and the sea.” It is asked, do these words embrace every little ditch or bank within the limits of the borough, whether public or private ; and, if not, where is the limit ? The answer is, that they embrace only such buildings, banks, sea-shores, mounds, and ditches within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguard of the borough against the encroachments of the sea. This may be gathered from the context, from the word “sea-shores,” from the expression “situate between the borough and the sea,” from the obvious intention and scope of the charter, as stated in the declaration. It seems to us that such construction and limitation of the words is necessary in order to give this part of the

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charter any meaning, and that no violence is done, either to the grammatical or reasonable sense of the words by such construction.

If so, the next question which arises is, whether the keeping up the sea defences of a town or borough is matter of general and public concern. It is said that the repair of a highway or a bridge is matter of public concern, because all the king's subjects *may* have occasion to use it. And why *may* not all the king's subjects have occasion to reside in, or to pass through, the town and borough of *Lyme*? It may be difficult to define precisely over what quantity of land, or to how large a district, any benefit must be extended in order to render such benefit a matter of general and public concern; but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extend to a whole town or borough. But it is said that, even if the repair of the sea defences of a town or borough be matter of general and public concern, yet that the declaration in this case does not show that the particular "buildings, banks, sea-shores, mounds, or ditches," alleged to be out of repair, are part of the sea defences of the borough, nor is it expressly averred that the public had any interest in them. The answer is, that the buildings, banks, sea-shores, mounds, or ditches in question, are described in the declaration in the very words used in the charter, as set out in the declaration, and are expressly averred to have been in existence at the time when the charter was granted and accepted; and it is also expressly averred that the corporation were liable under the charter to repair them. Now these words in the averments of the declaration must be understood in the same sense as the same words in the charter; and as we are of opinion that the true construction of them in the charter is to understand them as limited to the sea defences of the borough, so

we think that they are to be taken to have the same meaning in the declaration, and to have the same effect as if the buildings, banks, sea-shores, mounds, or ditches in question, were expressly averred to be part of the defences and safeguards of the borough and town against the encroachments of the sea.

And this opinion is further strengthened by the circumstance that the present objection arises after verdict. The effect of a verdict in curing defects in the pleadings at common law is stated correctly in one of the last cases on the subject, viz. that of *Jackson v. Pesked*. (a) There Lord *Ellenborough* said: — “Where a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided that it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial; but, unless the allegation is of such a nature that it would have been doing violence to the terms, as applied to the subject-matter, to have treated it as unrestrained, we are not aware of any authority which will warrant us in presuming that it was considered as restrained merely because, in the extreme latitude of the terms, such a sense might be affixed to them.” Here we think that the allegations of the declaration, as applied to the subject-matter, do by reasonable intendment show that the buildings, banks, mounds, and ditches in question were part of the defences and safeguards of the town and borough against the en-

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(a) 1 M. & S. 234.

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encroachments of the sea, and particularly of that part of the town and borough in which the Plaintiff's property is situated. The declaration, therefore, shows a charter casting an obligation on the corporation to do repairs of general and public concern, and avers that they have omitted to do such repairs, and that the Plaintiff has thereby sustained special damage. It is not, indeed, shown that the Plaintiff's house existed at the time when the charter was granted; neither can this be necessary; for if the obligation to repair be of a public nature concerning the whole borough, the whole borough has a right to be protected, and it is immaterial whether the inundation affects the lands, or houses at any time erected on those lands.

It is, however, further urged, that whatever engagement the corporation may be under as between them and the crown, so as to render them liable either to a forfeiture of their charter, or any other proceeding by the crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable, and also an action would lie for special damage, as in *The Mayor, &c. of Lynn v. Turner* (a), *Churchman v. Tunstal* (b), *Payne v. Partridge* (c), and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law that, whenever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now, we are unable to see any sound distinction between a liability by prescription, and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies

(a) *Cowp.* 86.
(b) *Hardr.* 162.

(c) *Show.* 255. *Carth.* 191.

some legal origin, and charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shown, would that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted, than it is now, after a great lapse of time? Certainly not. If, then, the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between *A.* and *B.*, nor even of a charter granted by the king, where no matter of general and public concern is involved; but where that is the case, and the king, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured, by action. If it were otherwise, many inconveniences would follow. Among them, in the case in question, is this: that as the duty and the right to repair the sea defences of the town and borough is cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessary, or, at all events, not until the corporation had been called upon, and neglected to do them; *The Earl of Lonsdale v. Nelson* (a); and it is doubtful, whether he would be justified even then, the proper remedy being, as there stated, by indictment or action; for nuisances of omission cannot in general be abated.

Two of the Judges have entertained considerable doubts whether the declaration contains sufficient words in this case to show that the mounds or banks were of such public benefit as that an indictment would lie for not

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(a) 2 B. & C. 302.

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repairing them; but agreeing in the general view of the law, they, as well as the rest of the Judges who heard the argument, are of opinion that the question proposed by your Lordships must be answered in the affirmative, and that the declaration is sufficient.

Judgment affirmed.

REGULÆ GENERALES.

IT IS ORDERED, That from and after the last day of this term, where such parts of the affidavit, verifying the certificate of acknowledgment, taken in pursuance of the late act of parliament, respecting fines and recoveries, as state "the deponent's knowledge of the party making the acknowledgment, and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

AND IT IS FURTHER ORDERED, That where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken, shall be taken for the first acknowledgment only.

And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one half of the original fees, and so also, where the same married woman shall at the same time acknowledge more than one deed respecting the same property.

And where, in either of the above cases, there shall be

more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

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In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

N. C. TINDAL.

J. A. PARK.

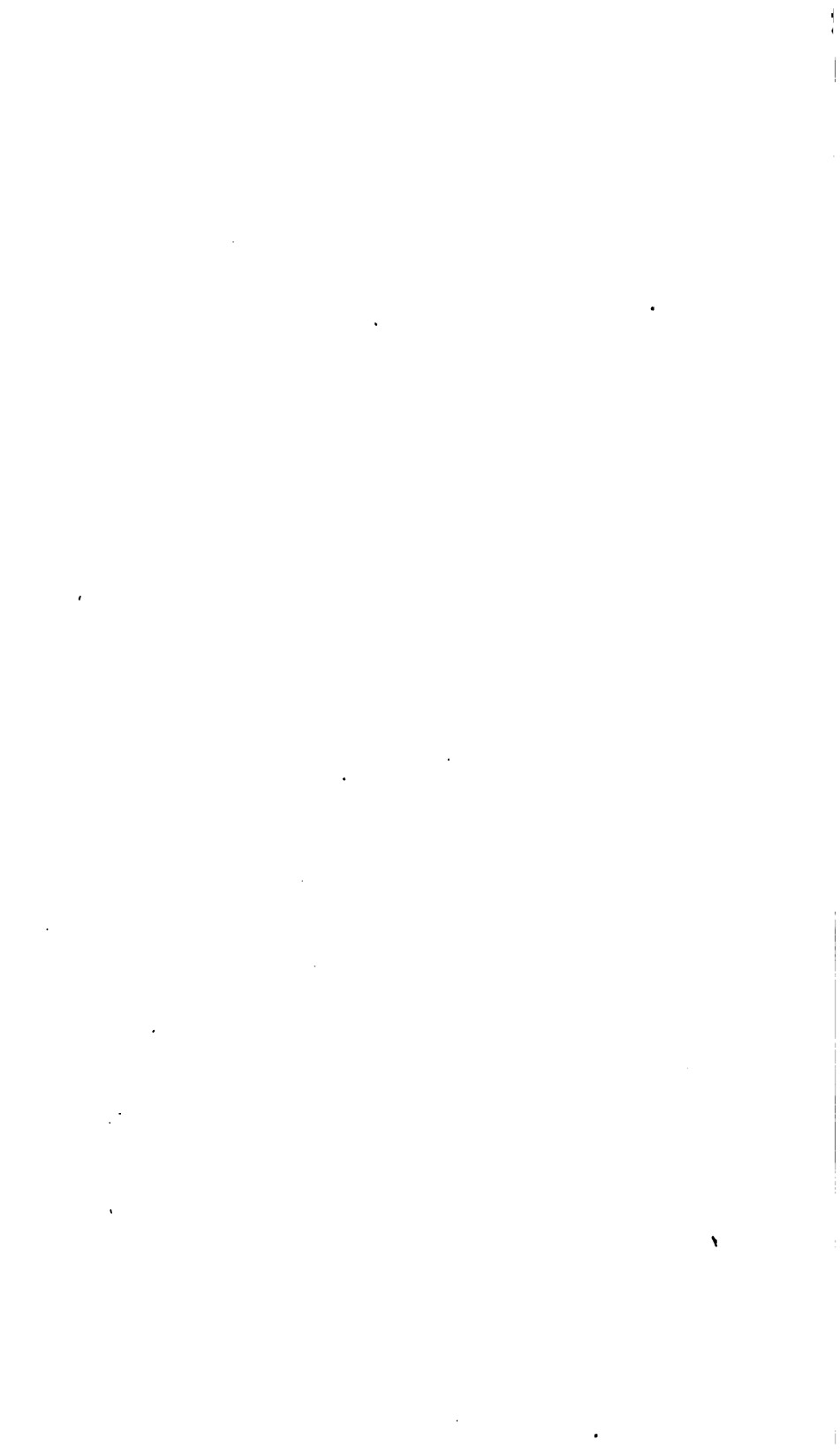
J. GASELEE.

J. B. BOSANQUET.

MEMORANDUM.

On the 7th of *July*, *Frederic Thesiger*, of the *Inner Temple*, Esquire, was appointed his Majesty's counsel; and *Matthew Davenport Hill*, of *Lincoln's Inn*, Esquire, received a patent of precedence, to rank next after Mr. *Thesiger*. Also, on the same day, *William Erle*, of the *Inner Temple*, Esquire, was appointed his Majesty's counsel.

On the 2d of *August*, *Cresswell Cresswell*, of the *Inner Temple*, Esquire, was also appointed one of his Majesty's counsel.



NEW CASES

IN THE
COURT OF COMMON PLEAS,

1834.

AND
OTHER COURTS.

Michaelmas Term,

IN THE
FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were,

TINDAL C. J.	VAUGHAN J.
GASELEE J.	BOSANQUET J.

POCOCK v. MASON.

Nov. 4.

R. v. RICHARDS moved to discharge the defendant from custody on entering a common appearance, because the copy of the *capias* served upon him at the time of the arrest, did not correspond with the form prescribed for that writ in the schedule of 2 *W. 4. c. 39.*, but omitted the article "*the*" and the preposition "*by*" in the mandate to the sheriff touching the return.

The copy ran, "after execution hereof," instead of "after *the* execution hereof;" and, "by order of the said court, or any judge thereof," instead of "by order of the said court, or *by* any judge thereof." [*Tindal C. J.* The expressions are equivalent; there is no

Omission of the words "the" and "by" in the copy of the writ of *capias* prescribed by the schedule 2 *W. 4. c. 39.*, Held not to invalidate an arrest.

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alteration in the meaning.] To ascertain whether or not an unfaithful copy produces any alteration in the meaning, supposes an exertion of intellect which it may be inconvenient to require at the hands of those who serve the copy. It was to obviate this inconvenience, that the legislature has given a form, and required that it should be pursued. Nothing but ordinary care is necessary for taking the copy; and to relax the rule will encourage looseness, and open a door to endless discussion. Accordingly the courts have hitherto required a literal compliance with the form. (a) But

The Court held, that this was, in substance, a copy; and *Richards*

Took nothing.

(a) See *Lindredge v. Roe*, *antè*, p. 6. and *Price v. Huxley*, 2 Cr. & Mee. 211.

Nov. 7. BAKER and Wife, Executrix of HUTCHINS, v. GOSTLING.

Plaintiff, a leaseholder, in consideration of 100*l.*, and a yearly sum of 7*6*l.** payable quarterly, by indenture under-demised and

THE Plaintiffs declared, among other things, that the testator *Hutchins*, being possessed of a messuage for the residue of a term of thirty-one years, commencing on the 25th of *December* 1823, by an indenture of the 17th of *December* 1825, between himself and the Defendant, in consideration of 100*l.*, and the yearly sum and covenants mentioned in the indenture, assigned the leased to Defendant certain premises for a longer term than Plaintiff had in them himself: Held, that a counterpart of this indenture, executed by Defendant only, and bearing only a 30*s.* stamp, was not admissible in evidence to support an allegation of assignment, on which Defendant had taken issue.

message to the Defendant for the residue of the term of years then to come.

Upon this allegation of assignment, the Defendant took issue.

At the trial before *Vaughan J.*, the Plaintiffs, to prove the assignment, gave in evidence, first, an indenture of the 1st of *August* 1824, between Sir *Richard Sutton* of the one part, and the testator *Hutchins* of the other, by which Sir *R. Sutton* demised the premises in question to *Hutchins* for thirty-one years from the 25th of *December* 1823, at the yearly rent of 35*l.*

They then put in the counterpart of the indenture of the 17th of *December* 1825, between *Hutchins* of the one part, and the Defendant of the other. By that indenture, in consideration of 100*l.*, and the yearly rent or sum and covenants therein mentioned, *Hutchins* under-demised and leased to the Defendant the premises in question, to hold from the 29th of *September* 1825, for thirty years, yielding and paying the yearly rent or sum of 75*l.* by equal quarterly payments. The counterpart was stamped with one stamp of 30*s.* and two of 20*s.* each, conformably to its length, and signed by the Defendant only.

The Defendant's entry was admitted.

On the part of the Defendant, it was objected that, if the deed between *Hutchins* and the defendant were, as it purported to be, a lease, it did not prove the alleged assignment; if it were an assignment, it was not admissible, as not having an *ad valorem* assignment stamp charged upon the whole consideration expressed for the assignment; viz., the 100*l.* paid down, and the improved rent reserved. The deed, however, was received in evidence; and a verdict was found for the Plaintiffs, with leave for the Defendant to move to set it aside, and enter a nonsuit on the above objection.

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1834. *Coleridge* Serjt. having obtained a rule *nisi* accordingly,

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Stephen Serjt. and *George* shewed cause. The deed was properly received in evidence, not as being in itself an assignment or conclusive proof of an assignment, but as being, in connection with the original lease from *Sutton*, and the entry of the Defendant, evidentiary of an assignment. Each of the deeds was on the face of it a lease, and was therefore properly stamped with a lease stamp; the joint effect of the two was to shew an assignment; but they could not, with propriety, have borne any stamp but such as the language of each, taken by itself, would warrant. In *Price v. Thomas* (a), by indenture in the form, and containing the usual covenants of a lease, *A.* demised premises to *B.*, and *B.* and *C.* covenanted to pay the rent; but *C.* was not otherwise referred to in the instrument. In an action against *C.*, on the covenant to pay rent, it was held that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary.

Secondly, even if the legal effect of the deed of *December* 1825, executed by *Hutchins*, was, of itself, to operate as an assignment, there was no inconsistency in styling it, for the technical purposes of pleading, an assignment; and at the same time treating it, for fiscal purposes, as merely a lease. In affixing the charge under the stamp act, the Court looks to the express language, and not the legal effect of the instrument; *Doe d. Kettle v. Lewis* (b); and upon this principle it was declared, at the stamp office, with respect to this identical deed, that a more proper stamp than the present could not be affixed. (c) If the instrument be once correctly stamped

(a) 2 B. & Adol. 218.

(b) 10 B. & C. 673.

(c) This was stated in an affidavit.

for fiscal purposes, the object of the stamp act is attained, and the instrument is in a condition to be exhibited for legal purposes, under whatever circumstances may arise.

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Again, assuming the deed of *December* 1825, executed by *Hutchins*, to be an assignment, and to require an assignment stamp, the deed executed by the Defendant was the counterpart of the assignment, and, as such, was properly stamped. For all the parts of a deed constitute but one deed; *Com. Dig. Faits*, D. 1, 2, 3. 2 *Bl. Com.*; and 30s. was a sufficient stamp for the assignment; the purchase or consideration money expressed, being under 150*l.* If the improved rent for thirty years were to be deemed part of the consideration money for the purposes of the stamp act, the stamp on the transfer of this small property would amount to 25*l.*; and if the counterpart of the assignment were to be classed under the head in the schedule, "Deeds not otherwise charged," the stamp on the counterpart would be 1*l.* 15s., when the stamp on the original assignment was only 30s., which could never have been intended by the legislature. The Courts put a mitigated, and not a strained construction, on the stamp act. *Boase v. Jackson* (a), *Robinson v. Macdonnell* (b), *Blandy v. Herbert* (c), *Duck v. Braddyll* (d), *Paul v. Meek* (e), *Burleigh v. Stibbs* (g), *Roe v. Davis* (h), *Mayor of Carlisle v. Blamire* (i), *Boone v. Mitchell*. (k)

Coleridge, in support of the double *ad valorem* charge upon such a deed as the present, referred to the schedule, 55 G. 3. c. 184.

"Lease, or tack of any lands, hereditaments, or

(a) 3 B. & B. 185.

(b) 5 M. & S. 228.

(c) 9 B. & C. 396.

(d) 13 Price, 455.

(e) 2 Y. & J. 106.

(g) 5 T. R. 465.

(h) 7 East, 363.

(i) 8 East, 487.

(k) 1 B. & C. 18.

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heritable subjects, *granted in consideration of a sum of money* by way of fine, premium, or grassum, *and also of a yearly rent* amounting to 20*l.* or upwards (save and except the leases and tacks hereinbefore exempted): —Both the *ad valorem* duties payable for a lease in consideration of a fine only, and for a lease in consideration of a rent only of the same amount:”

But contended that, at all events, there being no charge in the stamp act for a counterpart of an assignment, the deed must fall under the head, “Deed not otherwise charged;” in which case the stamp would be 1*l.* 15*s.* instead of 1*l.* 10*s.*, independently of the two 20*s.* stamps for additional length.

TINDAL C. J. The Plaintiff and his wife, as executrix of *Hutchins*, state, in the declaration, that *Hutchins*, being possessed of a messuage, &c. for the residue of a term of thirty-one years, commencing from the 25th of *December* 1823, by an indenture of the 17th of *December* 1825, between himself and the Defendant, in consideration of 100*l.*, and the yearly sum and covenants mentioned in the latter indenture, assigned the messuage to the Defendant for the residue of the term of years then to come. The Defendant puts in issue the fact of assignment; and, at the trial of the cause, the deed in question is given in evidence to prove the affirmative of that issue. The deed appears to be executed by the Defendant only, and contains a demise of the premises in question from *Hutchins* to the Defendant, in consideration of 100*l.*, to hold for thirty years, from the 29th of *September* 1825, yielding and paying the rent or yearly sum of 75*l.* by equal quarterly payments.

It is then objected, on the part of the Defendant, that the deed is improperly stamped. It bears a stamp of 1*l.* 10*s.*, and the question is, whether this is the stamp required for such a deed by the provisions of the

stamp act. The deed cannot be considered as an assignment, because it is not executed by *Hutchins* himself. It is useless, therefore, to consider what would be the proper stamp if the deed were an assignment. The Defendant contends that, at all events, it comes under the head in the stamp act of "Deed not otherwise charged," and that the stamp should have been 1*l.* 15*s.* We must, therefore, consider whether the deed could have been otherwise charged. The Plaintiffs say it might have been charged either as a counterpart of an assignment or a counterpart of a lease. But we think we are not at liberty to call it a counterpart of an assignment, because, under the head CONVEYANCE, in the schedule of the stamp act, which specifies *assignment* among other forms of conveyance, there is no mention of any *counterpart of assignment*, whereas, under the head LEASE, it is expressly provided that the counterpart shall be charged in the manner there pointed out. When we see, therefore, that the charge for a counterpart is provided for in the instance of a lease, and is omitted in the instance of an assignment, we cannot think that there was any intention in the legislature to charge such an instrument as the present as a counterpart of an assignment. Is it, then, a counterpart of a lease? I have no hesitation in calling it such; but the Plaintiffs, in their declaration, have called it an assignment: issue has been taken on the fact of assignment; and this deed has been put in to prove that issue. When the party himself has treated it as an assignment; I do not see how the objection is to be got over, because, if he calls it a lease, he has not proved his issue. I regret the decision to which we are obliged to come, but we must adhere to the uniform construction of the stamp act.

GASELEE J. As the party himself has treated the instrument as an assignment, the objection must prevail.

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Barron
v.
Gorringe.

1834.

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v.

GOSTLING.

The instrument, without an assignment stamp, is no proof of an assignment.

VAUGHAN J. I am reluctantly constrained to concur; for as no fraud was intended, the hardship on the party is great. But the issue has not been proved by the production of a deed with the proper stamp.

BOSANQUET J. I am of the same opinion. It is a matter of regret, when we are bound to decide on a stamp law contrary to the justice of the case. But here, the Plaintiffs have declared on an assignment of the residue of a term; the Defendant denies any such assignment, and the parties come to trial to settle that point. In order to prove the issue, a deed is put in which is not an assignment. It is said, it is the counterpart of an assignment. If so, it requires *some* stamp, and the stamp act imposes on deeds not otherwise charged, a stamp of 1*l.* 15*s.* It cannot be said that there is any charge of 1*l.* 10*s.* for such a deed as this; for although the act specifies a counterpart of a lease, there is no mention of any such deed as a counterpart of an assignment. The circumstance, that by such a construction of the act a higher charge is imposed on the counterpart than on the original, is by no means conclusive against the charge, as the result of the schedule in all its details might not have been foreseen.

Rule absolute for a nonsuit, the Plaintiffs not to be liable to costs.

1834.

DOE dem. ASHMAN v. ROE.

Nov. 7.

THE declaration was entitled, "In the Common Pleas, June 12th, 1834."

A declaration in ejectment need not be entitled of a term, or of a particular day as of a term.

The notice to the tenant was to appear within the first four days of next *Michaelmas* term: it bore date on the 15th of *October*, and was served on the 17th.

It is sufficient if it be entitled of a particular day.

T. D. Whatley now moving for judgment against the casual ejector,

The officer of the Court, conceiving that the rules of *Michaelmas* 3 W. 4. did not apply to the action of ejectment, objected, that the declaration should have been entitled of some term, or if of a particular day, as of some term. But

The Court held the declaration to be sufficiently entitled, and granted the rule prayed for.

FINCH v. BROOK.

Nov. 12.

THIS was a writ of false judgment from the county court of *Cambridgeshire*, where, to debt for goods sold, the Defendant pleaded *nil debet*, except as to 1*l.* 12*s.* 5*d.*, parcel of the demand; and as to that sum, that, after the time when the said sum of 1*l.* 12*s.* 5*d.*,

On a plea of tender of 1*l.* 12*s.* 5*d.* the jury found specially, that Defendant's attorney

called on Plaintiff and said, "I come to pay you 1*l.* 12*s.* 5*d.* which Defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; that Plaintiff said, "I can't take it, the matter is now in the hands of my attorney:" Held, upon writ of false judgment, that such finding did not warrant a judgment for Defendant.

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parcel, &c. became due and payable, and before the exhibiting of the bill of the Plaintiff in that behalf, to wit, on, &c. at &c. and within the jurisdiction aforesaid, the Defendant was ready and willing, and then and there tendered and offered to the Plaintiff, to pay the Plaintiff the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., to receive which of the Defendant the Plaintiff then and there wholly refused. Upon which, issue being joined, the jury found,

That the Defendant did not owe any part of the money demanded, except as to the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c.; and as to the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., that *Richard Tabram*, the attorney of the Defendant, by the direction and on the behalf of the Defendant, on the 25th of *May* 1833, and before the levying of the said plaint by the Plaintiff, called at the Plaintiff's shop in *Cambridge*, to pay the said sum of 1*l.* 12*s.* 5*d.*, parcel, &c., and had the money in his pocket for that purpose. That *Tabram* then and there saw the Plaintiff in his shop, and addressed him, and said that he, *Tabram*, had called on the Plaintiff to pay him a debt of 1*l.* 12*s.* 5*d.*, which the Defendant owed to him; that *Tabram* mentioned that precise sum to the Plaintiff; and that *Tabram*, at the same time, put his hand in his pocket for the purpose of taking out the said money, but did not actually produce the same: whereupon the Plaintiff, in answer, said, "I can't take it, (meaning the said 1*l.* 12*s.* 5*d.*.) the matter is now in the hands of Mr. *Cooper*;" who, the Plaintiff stated, was the clerk of Mr. *Cannon*, his attorney. That *Tabram* promised to see *Cooper*, and went away for that purpose; but having met and conversed with another person, he forgot to do so, and did not see *Cooper*. But whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the Defendant did tender and offer to pay to the Plaintiff the said sum of

1*l.* 12*s.* 5*d.*, parcel, &c., in manner and form as the Defendant had above in his plea alleged, the jurors were altogether ignorant, and therefore prayed the advice of the Court.

The Court below gave judgment for the Defendant.

Stephen Serjt. for the Plaintiff. The finding of the jury does not support the plea of tender; and the judgment below must be reversed. The money should have been actually produced, or it should have been found that the Plaintiff dispensed with its actual production; and, in that case, such dispensation should have been specially pleaded. *Dickinson v. Shee* (a) is in point. There, to prove the tender, the defendant gave in evidence, that he and a friend had gone to the chambers of the attorney for the plaintiff, and said, that he was come to settle with him the account of the plaintiff: that he produced a paper containing a statement of the account, in which he made the balance 5*l.* 5*s.*, which he said he was ready to pay; but he produced no money or notes. The plaintiff's attorney said he could not take that sum, as his client's demand was above 8*l.* And Lord *Kenyon* said, "That when there was a dispute as to the amount of the demand, the plaintiff, by objecting to the *quantum*, might dispense with the tender of the actual, or of any specific sum: there should, however, be an offer to pay by producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money, as he would not accept it; for, though the plaintiff might refuse the money at first, if he saw it produced, he might be induced to accept of it." To the same effect are *Leatherdale v. Sweepstone* (b), *Thomas v. Evans* (c), *Firth v. Purvis* (d), *Suckling v.*

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(a) 4 *Esp.* 68.(b) 3 *Carr. & P.* 342.(c) 10 *East*, 101.(d) 5 *T. R.* 432.

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Coney (a), and *Com. Dig. Pleader*, 2 *W.* 28. In *Douglas v. Patrick (b)*, the defendant pleaded, and established, that he was discharged by one of the plaintiffs from making the tender. In *Read v. Goldring (c)*, the defendant's agent pulled out his pocket-book, but the plaintiff refused to adjourn to a neighbouring house to receive the money. In *Kraus v. Arnold (d)*, there was nothing that approached a legal tender.

Butt, contra. The facts found by the jury, establish a dispensation of the production of the money. The rigor of the old cases has led to great injustice, and is relaxed by later decisions. In *Read v. Goldring*, the plaintiff's refusal to adjourn when the agent pulled out his pocket-book, was held to constitute a dispensation of the actual exhibition of the money, and to make the tender sufficient. That case is not, in substance, distinguishable from the present. Proof of tender of 20*l.* 9*s.* 6*d.* has been held to support a plea of tender of 20*l.*; *Dean v. James (e)*; and in *Polglass v. Oliver (g)*, *Bayley B.* said, "The party to whom a tender is made, may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced: *Lockyer v. Jones. (h)* There is reason and good faith in this decision; for if you objected expressly on the ground of the quality of the tender, it would have given the party an opportunity of getting other money, and making a good and valid tender."

TINDAL C. J. The ground on which I put my judgment is very short. All the cases agree that, in

(a) *Noy.* 74.(b) 3 *T. R.* 683.(c) 2 *M. & S.* 86.(d) 7 *B. M.* 59.(e) 4 *B. & Adol.* 546.(g) 2 *Cro. & Jar.* 17.(h) *Peake, N. P.* 239. n.

order to constitute a sufficient tender, there must be an actual production of the money, or a dispensation of such production. Here, there was no actual production. Was there any actual or implied dispensation? Upon that point the jury are silent; and the case is before us on the finding of the jury only. Now, the jury, if they were satisfied that there had been impliedly a dispensation, might have found generally for the Defendant; for, according to *Comyn's Digest*, S. 8., "the jury may find a general verdict for the plaintiff, where the special matter found would be against him: as, in *trover*, on proof of a demand and refusal, they may find for the plaintiff; but if it be found specially, it will be adjudged no conversion: vide *Action upon the Case upon Trover*, (E). On proof of a voluntary feoffment to a son, the jury may find it fraudulent as to creditors, &c.; but if it be found specially, it will not be judged so." But, here, they have stated the special matter without finding any actual or implied dispensation. The judgment of the Court below, therefore, must be reversed.

GASELEE J. I am of the same opinion. The jury, upon these facts, might have found for the Defendant on the ground of a dispensation, as in *trover* they may find a conversion from the circumstances of demand and refusal; and had they found a dispensation, the Court would not have interfered. But no such fact being found, and no money having been produced, the judgment must be reversed.

VAUGHAN J. I regret that I feel myself bound to come to the same conclusion. The cases cited for the Plaintiff were nearly all considered in *Lockyer v. Jones*; and it was said by *Mansfield C. J.*, in a later case, that great importance was attached to the production of

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BOSANQUET J. I agree with the rest of the Court, on the ground that this objection arises on the finding in the special verdict, although I am not prepared to say the circumstances might not have warranted the jury in finding for the Defendant.

Judgment reversed.

Nov. 13.

WELSH v. LYWOOD.

An affidavit in justification of bail, omitting to disclose their residence, is insufficient, notwithstanding the Plaintiff does not appear to oppose.

THE bail in this case were not opposed; but the officer of the Court refused to pass them, because the affidavit of justification did not disclose, as required by the new rules, their place of residence during the last six months.

Archbold, for the Defendant, contended, that as the Plaintiff would have waived the irregularity by excepting to the bail, *Bigg v. Dick (a)*, *a fortiori*, he waived it by not excepting. But

The Court held the affidavit to be nevertheless insufficient, and gave time to amend.

(a) 1 Taunt. 17.

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MARY SLATTER, Widow, Demandant; GEORGE SLATTER, Tenant. Nov. 14.

IN this cause, by a special case, it was stated that *John Slatter* died on the 21st of *October* 1832, intestate, and without issue, leaving *Mary Slatter*, his widow, *George Slatter* the elder, his father, and *George Slatter* the younger, his brother and heir at law, the Tenant in this action, him surviving.

That the intestate died seised as of fee of a freehold messuage or dwelling-house.

That the intestate also died possessed of considerable personal estate, consisting of stock in trade, &c., together with 6000*l.* Bank 3 per cent. annuities standing in the joint names of the intestate, and of *Charles Druce* the younger, *John Druce*, and *George Nugent*, which said last-mentioned sum of 6000*l.* was left upon the trusts contained in a certain indenture of *January* 1831.

That (the Demandant employed *T. A. Lock*, as her attorney and solicitor, to assert her claims at law and equity upon the real and personal estates of her late husband, the intestate.

That *George Slatter* the elder, and *George Slatter* the younger, employed the same attorney at law and in equity.

That the Demandant, on the 22d of *October* 1832, came, accompanied by one *Kitching*, to the freehold house in question, and declared she came to claim such rights as she was entitled to as the widow of the intestate; and continued therein until the 31st of that month, when the Tenant turned her out by force; and at that time *Kitching*, in her presence, and by her assent, declared that she was entitled to remain in the

In dower, the Tenant pleaded, in *May* 1833, that Demandant had elected to receive an annuity in satisfaction of dower: Held, that the plea was not supported by shewing the Demandant's receipt of dividends in *September* 1833:

Held, also, that an order made in a suit in Chancery between the Demandant, Tenant, and others, was admissible in evidence for the Demandant in dower, to shew the circumstances under which the dividends were received.

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house for forty days after the decease of intestate. In *November* 1832, the Demandant caused a notice in writing to be served on *George Slatter* the younger, by which she required him to assign her dower out of a freehold dwelling-house of the intestate's, of which he had taken possession. She commenced the present action in *January* 1833; to which action the Tenant appeared by his said attorney; and on the 24th of *May* following, pleaded,

1st, That the intestate was never seised of any estate whereof he could endow the Demandant:

2dly, That the Demandant, after marriage, by a separation deed of *January* 1831, agreed to execute a deed releasing her right of dower:

3dly, That after the death of her husband, she elected to receive an annuity of 180*l.* in recompence and satisfaction of dower, and actually received 90*l.* of the annuity for one half year.

The Demandant demurred to the second plea, and took issue on the first and third, on the 15th of *June* 1833. The demurrer came on to be argued in *November* last, when the Tenant not appearing, the Court ordered that judgment should be entered for the Demandant; on the following day, judgment was signed accordingly, and notice of trial was, on the same day, given for the sittings after last *Michaelmas* term upon the issue joined upon the first and third pleas.

On the 5th of *June* 1833, the Demandant filed her bill in the Court of Exchequer against *George Slatter* the elder, the administrator of the intestate, and others, in respect of her claims upon the intestate's personal estate.

The said *George Slatter* the elder, on the 9th of *August* 1833, obtained, by consent, an order in the said last-mentioned cause, by which it was directed that the *Druces* and *Nugent* should receive the dividends of the 6000*l.* 3 per cent. consols, standing in the joint names

of themselves and the intestate, and pay the same to the Demandant until the further order of the Court, and that such payment should be without prejudice to any claim the Demandant might have on the intestate's real estate.

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The Demandant, on the 9th of *September* following, for the first time since the death of the intestate, received the sum of 180*l.*, being two half-year's dividends on 6000*l.* 3 per cent. bank annuities, which accrued due subsequent to the intestate's decease. After the making of the said order of 9th of *August* 1833, the Tenant also commenced and now carries on the trade or business of the intestate in his aforesaid dwelling-house.

In *November* last, the Tenant filed his bill in Chancery against the Demandant, setting up the said deed of separation in bar of dower, and alleging that the Demandant had, since the death of the intestate, elected to take the annuity, and prayed an injunction against the proceedings in this action: an injunction was obtained in *January* 1834, and dissolved in the *February* following by the Vice-Chancellor.

This cause came on to be tried in *December* 1833 before *Tindal C. J.*, when the Tenant, without pleading *pais darrein continuance*, offered in evidence, on the third plea, the deed of separation of *January* 1831,—a certain power of attorney from *John Slatter*, the intestate, *Charles Druce* the younger, *John Druce*, and *George Nugent*, to *Mary Slatter*, the Demandant, authorizing and empowering her to receive the dividends on 6000*l.* 3 per cent. bank annuities,—and the dividend warrants for two half-year's dividends accrued on such stock, signed by the said *Mary Slatter* as such attorney, and both bearing date the 9th of *September* last. Whereupon, the Demandant put in the said order of the Court of Exchequer of the 9th of *August* last.

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A verdict was found for the Demandant, subject to this special case, in which the question for the consideration of the Court was, whether the evidence given of the receipt of the 180*l.* on the 9th of *September* 1833, was sufficient to support the issue on the third plea of election in bar of dower; and whether the order of the 9th of *August* 1833 was admissible to shew under what circumstances the 180*l.* was so received.

Merewether for the Demandant. The receipts were not admissible in evidence to shew that the Demandant had elected to take the annuity in satisfaction of dower; for they were not given till the 9th of *September*, and the plea averring her acceptance of the annuity was pleaded on the 24th of *May*. Nor could they lead to an inference of such acceptance *ex consequenti*; for, under the order of the Court of Chancery, the money was expressly taken without prejudice to the present claim.

And the order was properly admitted in evidence; for, though it were made in a suit to which others were parties besides the present Demandant and Tenant, yet it was not produced to prove the decree between the parties to the Chancery suit, but to shew the circumstances under which the Demandant consented to receive the dividends on the 9th of *September*.

At all events, the acceptance of the dividends was no legal bar to the wife's claim of dower. *Co. Lit.* 34. b. "An assignment of other land whereof she is not dowerable, or of a rent issuing out of the same, is no barre of her dower."

W. H. Watson, contra. The receipts were admissible in evidence, not to shew an election after plea pleaded, but as evidentiary, in connection with other circumstances, of an election previously made; just as demand

and refusal are, in *trover*, evidentiary of a conversion : *Wilton v. Girdlestone*. (a) And the decree in Chancery being *res inter alios gesta*, could for no purpose be admissible between these parties.

As to the annuity being a legal bar to the claim of dower, the authorities are certainly against it, but the passage in *Co. Lit.* applies to an assignment of dower by the sheriff; while, here, the receipt of the annuity is an act *in pais*, which operates as a satisfaction of the Demandant's claim. Even an assignment of dower by the sheriff, not made according to law, would, if accepted, be considered at common law as accepted in lieu of dower.

TINDAL C. J. I am of opinion that the evidence offered in proof of the plea that the Demandant elected to receive an annuity of 180*l.* in recompense and satisfaction of dower, was not sufficient, even if admitted, to support that issue. The writ of dower was sued out in *January* 1833, and the receipt offered in support of the plea was not given till nine months after. The latest time in respect of which evidence of satisfaction would have been admissible, was the time of plea pleaded; but at that time it is not pretended that any thing had been received, and there is no reason why this single act of subsequent receipt should have relation back, like an admission made after action brought; for the fact that the Demandant refused the first half-year's dividend, and only received it with the second, under protest, is sufficient to shew that she had not elected to abandon her claim. It is not necessary to decide the question on the admissibility of the order in Chancery, although I am clearly of opinion that it did not fall within the rule of *res inter*

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(a) 5 B. & Ald. 847.

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alias gesta, but was admissible, as one of the surrounding circumstances, to shew *quo animo* the Demandant received the dividend in question.

GASELEE J. I think it clear that the receipt was not admissible in evidence, because it was given subsequently to the time of plea pleaded. It is unnecessary to decide the question as to the order in Chancery; but there can be no doubt it was admissible to shew the state of the Demandant's mind when she received the dividend.

VAUGHAN J. I am of the same opinion. The receipt, if it had been admitted — and it was the only proof offered in support of the issue — would not have established the election alleged to have been made by the Demandant. But the order in Chancery was admissible to shew under what circumstances the dividend had been received.

BOSANQUET J. I am of the same opinion. The receipt, being so long subsequent to the time of plea pleaded, was not sufficient of itself to support the issue that the Demandant had elected to receive an annuity of 180*l.*, in recompense and satisfaction of dower; and the order in Chancery was properly admitted, not to shew the adjudication between the parties to that suit, but the circumstances operating on the Demandant at the time of the receipt.

Judgment for Demandant.

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In the Matter of SARAH LUKE, an Infant, Wife Nov. 14.
of GEORGE LUKE.

MRS. LUKE, an infant trustee, had, before she was married, received an order from the Duchy of Lancaster Court of Chancery to convey the trust estate to other trustees, pursuant to 11 G. 4. c. 60. s. 6. Practice.
Certificate of
cognizance of
infant feme
trustee.

Before the conveyance could be drawn up, and while she was still an infant, she married, and it became necessary that the conveyance should be by fine.

But the commissioners for taking the cognizances of married women being required by stat. 3 & 4 W. 4. c. 74. s. 84. to certify that the cognizor is of full age, "subject to any alteration in the form of the certificate to be made by order of the Court of Common Pleas,"

Adams Serjt. prayed that, under the circumstances of the present case, the Court would make an order authorising the commissioners to take the cognizance of Mrs. Luke without certifying that she was of full age.

This was acceded to by the Court, and an order was directed to be made out to that effect, reciting the previous order of the Court of Chancery.

Fiat.

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TRIEBNERR v. DUERR.

A Defendant may plead to the same demand, first, the general issue; and, secondly, that the demand accrued for carrying into effect illegal wagers.

TO debt for work and labour and for money paid to the use of the Defendant,

Channell obtained a rule *nisi* to plead, first, the general issue; secondly, as to 98*l.* 13*s.* 7*d.* parcel, &c. that the work was done and the money paid by the Plaintiff in making and carrying into effect illegal wagers as to the price of tallow.

Cleasby opposed the motion, on the ground that pleas so inconsistent could scarcely have been pleaded to the same demand, under the old practice, and under the new rules were inadmissible together.

TINDAL C. J. There is nothing unreasonable in allowing the Defendant to plead the general issue, and, that part of the work was done in furtherance of an illegal contract.

The word *inconsistent* does not appear in the new rules, and pleas are authorised which on the face of them do not appear consistent; as, "pleas of payment, and of accord and satisfaction, or of release;" — "pleas of an agreement to accept the security of *A. B.* in discharge of the Plaintiff's demand, and of an agreement to accept the security of *C. D.*;" — "pleas of soil and freehold of the Defendant in the *locus in quo*, and of the Defendant's right to an easement there."

The object of those rules was, to prevent the record from being loaded with unnecessary repetitions of pleas which were the same in effect, and addressed only to

one ground of defence; not, to prevent a party from putting in distinct answers to the same claim.

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GASELEE J. and VAUGHAN J. concurred.

BOSANQUET J. This application does not rest on the new rules, but on the statute of *Anne*, by which the Court, at its discretion, may regulate the number of the Defendant's pleas. The object of the new rules was to prevent the same defence from being repeated under several different forms. Here the defences are not the same. The first turns on matter of fact, that there was no contract between the parties; the second on matter of law, that the contract, if any existed, was illegal.

Rule absolute.

LOW v. CHIFNEY.

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TO a declaration on a bill of exchange for 250*l.*, drawn by *Thomas Teed* on the Defendant the 8th of *October* 1833, payable nine months after date; accepted by the Defendant; and by *Teed* indorsed to the Plaintiff,

The Defendant pleaded, that the said bill of exchange was accepted by the Defendant without any consideration passing from the said *Thomas Teed* to the Defendant for accepting the same.

Demurrer and joinder.

Bompas Serjt. appeared in support of the demurrer, but the Court called on

To a declaration by indorsee against acceptor, Defendant pleaded that the bill was accepted without consideration from the drawer: Held ill, and that under the rule of *Hill. 4 W. 4.* Plaintiff might demur.

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Alexander to support the plea. In *Heath v. Sansom* (a) it was held, *Parke J. dissentiente*, that in all cases, where, from defect of consideration, the original payees could not recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee, though he might have had no notice that such proof would be called for. And by the general rules of *Hil. 4. W. 4. (Assumpsit, 3.)* the Defendant is obliged to plead what he would formerly have been allowed to prove under the general issue, particularly illegality of consideration by accepting bills by way of accommodation. The Defendant being so obliged to plead such matter, and having by his plea cast suspicion on the Plaintiff's claim, the Plaintiff should, instead of demurring, have replied, what, before the new rules, he must have proved at the trial in order to rebut the suspicion affecting his title.

TINDAL C. J. The distinction between *Heath v. Sansom* and the present case is this, that in *Heath v. Sansom* the question arose at the trial under the general issue, and suspicion was cast upon the plaintiff's claim by his own evidence: here the question arises upon a plea which professes to be an answer to the action. In *Heath v. Sansom*, it appeared, upon the plaintiff's shewing, that *Sansom*, being indebted to a firm in which he was partner, gave a note in the name of another firm to which he also belonged, in discharge of his individual debt. The payees indorsed it over, and the indorsee sued *Sansom* and his partner in the second firm. Suspicion being cast upon the transaction, it was properly held that that note was made in fraud of *Sansom's* partner in the second firm, and could not be enforced against him by

(a) 2 B. & Adol. 291.

the payees; and that, at least under those circumstances of suspicion, the indorsee could not recover without proving that he took the note for value, though no notice had been given him to prove the consideration. Here, it is only stated that the *acceptor* of the bill received no consideration from the drawer: consistently with that, the *indorsee* might be suing on the fairest case. No suspicion is thrown on the transaction, and indorsement *prima facie* imports consideration.

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GASELEE J. In *Heath v. Sansom* the question arose on the general issue, and a suspicion was thrown on the plaintiffs' title by his own evidence, which it became necessary for him to rebut. The plea here does not affect the Plaintiff, and is no answer to the action.

VAUGHAN J. Our judgment must be for the Plaintiff. How was he to know what had passed between the drawer and acceptor?

BOSANQUET J. *Heath v. Sansom* does not apply to the present case, having merely established that, when under the general issue, suspicion is, at the trial, cast on the plaintiffs' claim, it becomes necessary for him to clear it up in order to recover on a bill of exchange; but what is stated in a plea ought to be an answer to the action, and inconsistent with the Plaintiff's legal demand.

Judgment for the Plaintiff.

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Nov 15.

M'ANDREW v. ADAM.

If a rule is drawn up in the alternative, the party who fails on the substantial question is not entitled to the costs of the rule, although he succeeds upon the alternative.

THE Plaintiff had obtained a verdict for 254*l.*; upon which the Defendant obtained a rule, calling on the Plaintiff to shew cause why the verdict should not be set aside, and a nonsuit be entered instead, *or* why the verdict should not be entered for nominal damages only.

The Plaintiff shewed cause against the rule, which was made absolute for reducing the verdict to nominal damages.

Upon the taxation of costs in the cause, the prothonotary having declined to allow the Plaintiff his costs of opposing the above rule,

W. H. Watson, in order to obtain these costs, obtained a rule *nisi* on behalf of the Plaintiff for a review of the taxation.

Wilde Serjt., who shewed cause, relied on *Spitta v. Woodman* (a), where it was held that, if the Plaintiff recovered a verdict for a loss on a policy, and endeavoured unsuccessfully, on a rule *nisi* being obtained for a nonsuit, to support his verdict to the full extent, he was not entitled to the costs of the rule, although he was held to be entitled to the premium. At all events the Plaintiff here came too late; for the motion in question was disposed of in *Trinity* term, and the costs should have been asked for when the rule was under discussion.

(a) 3 Taunt. 406.

Watson. These are costs in the cause generally; and it was not necessary to ask for them on the particular motion. *Spitta v. Woodman* is a case of doubtful authority; for the objection alleged to have been made by *Shepherd Serjt.*, in the report, 3 *Taunt.* 406., is inconsistent with the state of the cause as set forth in 2 *Taunt.* 416. And *Heath J.* puts the decision on the ground that the parties were *in pari conditione*, which could not have been the case if, as appears in the report in 2 *Taunt.*, the plaintiff had a verdict. Here, if the rule had not been in the alternative, for a nonsuit, or a reduction of damages, the Plaintiff might have consented to the reduction of damages. As it was, he was obliged to appear on the rule in order to protect his verdict, and having succeeded to that extent, he ought to have his costs on the rule. In the Court of King's Bench it is the practice, in such a case, to allow the costs of the rule.

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TINDAL C. J. The point for our consideration is in substance this, whether the Plaintiff, upon a rule in this Court, which substantially is found against him, is entitled to obtain the costs of such rule as costs in the cause.

It is said that, because the rule was drawn up with an alternative, the Plaintiff was, at all events, obliged to appear and shew cause.

If there were any distinction, as to costs, between a rule in the alternative and other rules, there might be some weight in the argument.

But the expense is the same, whether a party comes to oppose a rule on one point or two.

When the rule was served in the alternative, if the Plaintiff meant to call for the costs of it as costs in the cause, he ought to have given notice to his opponent

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that he abandoned his resistance on that point, which ultimately proved untenable.

As he omitted to do this, and cast on his opponent the onus of supporting the entire rule, it is precisely a case in which neither party is entitled to costs.

The rest of the Court concurring, the rule was

Discharged.

Nov. 17.

SIMONS and Another v. FARREN.

To covenant for rent, plea that Defendant, with the consent of lessor, carried on the business of a retail brewer and retailer of beer, whereupon a forfeiture was incurred, and he was evicted by *B. C.* having good right and title to the premises as heir of *C.*, with whom Defendant's lessor had covenanted not to carry on the business of a retailer of beer without the consent of *C.*, Held ill.

COVENANT for rent due under an indenture of demise of the 9th of *July* 1830, between Plaintiff and Defendant, in which, among other things, Defendant had covenanted not to carry on upon the premises demised the business of a *retailer of beer, ale, or spirituous liquors*, without first obtaining the Plaintiffs' leave in writing.

The Defendant pleaded, that one *Chantrell* and his wife, being seised in fee of the premises, by indenture of *August* 1820, demised them to one *Ponder* for twenty-one years, and that *Ponder*, for himself and his assigns, covenanted not to carry on upon the premises the business of a *common brewer or retailer of beer or spirituous liquors*, without first obtaining the leave of *Chantrell* and his wife in writing; and that it was provided that the term granted to him should determine and be void, and that the *Chantrells* should be entitled to re-enter, upon his failing to keep his covenant:

That the Plaintiffs, after making the indenture of *July* 1830, by licence in writing, authorised the Defendant to exercise on the premises the trade of retail

brewer, *that is to say, the business of a brewer and of a retailer of beer* : (a)

That the Defendant, *after such consent*, and before the rent claimed in the declaration became due, entered on the premises and there carried on the trade of a retail brewer, *and of a retailer of beer* : (a)

And that whilst he was in possession of the premises, and so carrying on in them the trade of *a retailer of beer*, (a)

On the ground that he was so carrying on upon the premises the business of *a retailer of beer* (a), and that a forfeiture of the lease of *August 1820* was occasioned thereby,

One *R. D. Chantrell*, having good right and title to the premises as eldest son and heir to the said *Chantrell* and wife, before the rent claimed in the declaration became due, delivered a declaration in ejectment to the Defendant, upon which judgment was afterwards entered up, and a writ of possession issued against the Defendant, and thereupon,

Before the rent claimed in the declaration became due, the Defendant was by force of that writ put out, amoved, and evicted from the said demised premises.

Replication, That the said supposed licence or consent in writing, in the said plea of the Defendant mentioned, was and still is subject to a certain proviso therein mentioned, in the words and figures following, that is to say, " We do hereby authorise and permit *Mr. James Farren* to use and exercise his trade of a retail brewer upon the premises comprised in a certain indenture of lease of even date herewith; and we undertake not to molest or disturb the said *James Farren*, his under-tenants or assigns, in his or their

(a) The words in italic were inserted upon amendment. See *ante*, p. 126.

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possession, notwithstanding any such occupation of the said premises may be contrary to the proviso in such lease contained. Provided always, nevertheless, that this authority is not to exempt, or be construed to exempt, the said *James Farren*, or his executors or administrators, from any liability under his covenant contained in the said indenture of lease, in case the original lessor or his assigns should commence any proceedings for the breach of any such covenant or proviso as contained in the original lease: as witness our hands this 9th day of *July 1830*. — *John Simons, Richard Battley*."

Demurrer and joinder.

W. H. Watson in support of the demurrer. The replication is ill, for it neither denies, nor confesses and avoids the plea. And the Plaintiffs having themselves authorised the Defendant to carry on the business of a retail brewer, subject to his liability to forfeit the term, must abide by the consequences of the forfeiture. One of those consequences is, that the lease is avoided, and the rent extinguished; so that, if the Plaintiffs have any claim whatever on the Defendant, at all events they cannot sue on the covenant in a void lease: *Bac. Abr. Rent (L)*, *Vin. Abr. Rent (Z)*: not even for an apportionment of the rent that might have been accruing at the time of the eviction. In like manner, where freight reserved by a charter-party is to accrue on the ship's arrival at *B.*, the shipowner cannot sue *pro rata itineris* if the ship be lost before arrival; *Cooke v. Jennings (a)*: or for a substituted voyage; *Thompson v. Brown (b)*, *White v. Parkin. (c)*

And, without going into the other particulars, the plea discloses a sufficient eviction by alleging that

(a) 7 T. R. 381.

(b) 7 Taunt. 656.

(c) 12 East. 578.

R. D. Chantrell having right and title entered. *Jordan v. Twells* (a), which decided that a defendant who relies on an eviction should shew, in his plea, that the party evicting had a title inconsistent with the plaintiff's, is, in effect, overruled by *Foster v. Pierson* (b), and *Hodgson v. The East India Company* (c), in which it was held, that a plaintiff who sues for breach of a covenant for quiet enjoyment, may state generally that the party evicting had right and title to enter, without setting forth the particulars of such title. If carrying on the business of a retail brewer was not a ground of forfeiture under the covenant in the deed of 1820, the Plaintiff might have replied to that effect.

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Barstow, contra. The plea is ill. For, assuming that it might have been sufficient if it had alleged simply that *R. D. Chantrell*, having good right and title, evicted the Defendant, yet, as the Defendant has proceeded to assign the grounds on which *R. D. Chantrell* entered, if those grounds be insufficient, the plea cannot be sustained. And it clearly appears upon this plea that no forfeiture had been incurred. For, assuming the trade of a retail brewer to fall within the meaning of the covenant against carrying on the trade of a retailer of beer, still the covenant in the lease of 1820 was a covenant not to carry on the trade of a retailer of beer *without the consent in writing of the Chantrells*; and though the plea alleges that the Defendant carried on the trade in question, it does not allege that he carried it on without the consent of the *Chantrells*. The Defendant, therefore, having omitted to negative the *Chantrells'* consent, it must be taken, on his own shewing, that there was no forfeiture. [The Court here offered to permit

(a) *Cas. Temp. Hardw.* 171.

(c) 8 T. R. 278.

(b) 4 T. R. 617.

1834. *Watson* to amend the plea by inserting the requisite negative; but he refused.] And a strict construction always prevails in cases of forfeiture: *Jones v. Thorne* (a), *Doe d. Spencer v. Godwin*. (b)

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But the trade of a retail brewer is not within the covenant. For the lease of 1820 provides against the only trades of the sort that were carried on at that time; common brewer, retailer of beer, and of spirituous liquors; the trade of retail brewer derived its existence from the statute 4 G. 4. c. 51. which was not passed till 1824 (See 2 *Chitty's Burn's Justice*, 311. 246.), and the parties could not have intended to prohibit a trade which did not exist when they executed the lease.

Watson. Taking the whole plea together, it is sufficiently shown that the Defendant carried on the prohibited business without the consent of the *Chantrells*; for it is alleged, that a forfeiture was incurred by the carrying on the business, which would not have been the case if it had been carried on with the consent of the *Chantrells*; and the Plaintiffs might have replied such consent if it had been given; and though on special demurrer the objection might have prevailed, on general demurrer the court will look to the effect of the entire pleading. *Charnley v. Winstanley*. (c) The defect, if any, is covered by pleading over. But the whole of the allegation touching the forfeiture may be rejected as surplusage; for the plea avers that *R. D. Chantrell*, having good right and title to the premises, evicted the Defendant, and that averment was held in *Foster v. Pierson*, confirmed by *Hodgson v. East India Company*, a sufficient allegation of a breach of covenant for quiet enjoyment. In the latter case, Lord *Kenyon* says, "We have, since the argument,

(a) 1 B. & C. 715.
(b) 4 M. & S. 265.

(c) 5 East, 266.

looked into the case of *Foster v. Pierson*, which was relied upon as an authority in support of this declaration, and in which all the former cases were considered; and we are of opinion, that the breaches here are properly assigned. If they were not, it would impose insuperable difficulties on the Plaintiff; for I do not know how it was possible for him to set forth the particulars of the titles of the persons who entered upon him; such knowledge could only be acquired by an inspection of title deeds, to which he could have no access."

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TINDAL C. J. The ground on which my judgment is formed, renders it unnecessary for me to make any observation on much that has been urged in argument. For the question is reduced to a single point, whether or not on these pleadings an eviction has been properly pleaded. The Plaintiffs declare in covenant for rent arrear. The Defendant has pleaded, that the premises were originally demised by *Chantrell* and his wife to the plaintiffs, for a term which is not yet expired, under a covenant that the business of a retailer of beer should not be carried on upon the premises without the consent of *Chantrell* and his wife; that before the rent claimed became due, the Defendant with the consent of the Plaintiffs carried on that business on the premises; and that on the ground that thereby a forfeiture of the *Chantrells'* lease was occasioned, one *R. D. Chantrell*, having good right and title to the premises as eldest son and heir of *Chantrell* and wife, evicted the Defendant;—and the question is, whether this eviction is well pleaded or not.

Certainly, in *Jordan v. Twells*, where, to debt on a covenant for rent, the defendant pleaded an eviction by *K. P.*, having a prior and better right and title than the plaintiff, upon demurrer, because the defendant did not set forth *what* right or title *K. P.* had, the Court allowed the objection, on the ground that the defendant ought

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to have alleged a title in *K. P.*, inconsistent with the plaintiff's title; and Lord *Hardwicke* said, "the defendant ought to have shewn that *K. P.* had a title to enter; for possibly she had no right of entry, though she had a right to recover in a real action."

It is contended, however, that this decision is in effect over-ruled by *Foster v. Pierson* and *Hodgson v. East India Company*; but I do not think that those cases can be said to have that effect. In those cases the actions were brought against the grantor by the grantee, who had been evicted, and who had no means of setting forth the particulars of the titles of those who had entered on him: here, the grantee, in answer to a claim for rent by the grantor, relies upon an entry by a third person on grounds with which by his plea he has shewn himself to be acquainted; and, generally speaking, more strictness is required in a plea than in a declaration. But it is not necessary to decide the case on this ground; for there is a manifest distinction between setting forth the particulars of the title of the party who enters, and setting forth simply the ground of entry; and I am not struck with the argument of hardship in this case; for if the Defendant had stood his ground in the ejectment, he would at all events have learned on what authority the entry was made. We come round then to the question, whether upon this plea the eviction is properly pleaded.

The covenant for the breach of which the entry was made, was a covenant not to carry on, upon the premises, the business of a retailer of beer without the consent of *Chantrell* and his wife; and the Defendant has pleaded that a forfeiture was incurred by the fact that the business of a retailer of beer had been carried on; and that *R. D. Chantrell*, having good right and title *as eldest son and heir* of *Chantrell* and wife, evicted the Defendant before the rent claimed in the declaration became due.

First, is this a breach of the covenant at law? and if not, is there any sufficient general allegation that the party entering had good title to the premises?

Now the covenant for the breach of which the grantors or their heir would be authorized to re-enter, was not simply a covenant against carrying on a particular trade, but a covenant against carrying it on without the consent of the grantors: the covenant therefore was not broken by simply carrying on the trade: it should have been averred and proved that it was carried on without the consent of the *Chantrells*: for it is a rule of pleading, well known ever since the case in Lord *Raymond* (a), that where any stipulation in the nature of a condition precedent accompanies a covenant, particularly where it forms a member of the same clause, the covenant is not shewn to have been broken without shewing a breach of the accompanying stipulation also. As, in covenant to pay 5s. per day, after notice that he would not act any more: proviso, that no notice shall be given but in an acting week; breach, that he gave notice *sec. formam articulorum*, was not sufficient, but he ought say expressly that it was in an acting week; for the proviso is part of the covenant itself: *Com. Dig. Pleader* (C), 47.

But here, it is said, the preceding part of the plea may be rejected as surplusage, and the Defendant may rely on the general words, that *R. D. Chantrell*, having good right and title as eldest son and heir to *Chantrell* and wife, entered and evicted. That, however, would be putting a forced construction on the language of the plea, which does not assert his title generally, but merely that the claim of *Chantrell* and wife, having descended on him as heir, he was entitled, as such, to take advantage of the alleged forfeiture.

On the broad ground, therefore, that it does not

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(a) *Thorpe v. Thorpe*, 9 1 *Ld. Raym.* 662.

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contain any general allegation that the Defendant was evicted by one having title to the premises, nor any such special statement of facts as discloses a title by forfeiture, I think this plea affords no answer to the action, and that it is not cured by the Plaintiffs' pleading over, the claim set out being insufficient to justify the entry.

GASELEE J. His Lordship having gone so fully into the question, I need only add, that I concur in the opinion he has expressed. But I cannot see that any trade prohibited by the original lease has been carried on on the premises. For a *retail brewer* is not what was meant by a *common brewer*; and though it is alleged, that the underlessee carried on the business of a retail brewer, "*that is to say, of a retailer of beer,*" by the licence of the Plaintiffs, yet, in the licence set out by the replication, the business of a retailer of beer is not mentioned.

VAUGHAN J. It is with much diffidence that I pronounce an opinion at variance with that of the rest of the Court, particularly on a point of pleading with which those from whom I differ are well acquainted. But unless there be a distinction between plea and declaration, I should have thought this plea sufficient, under the authority of *Forster v. Pierson*, where it was held, that in assigning a breach of covenant for quiet enjoyment, it was sufficient to allege that at the time of the demise to the plaintiff, *A. B.* had lawful right and title to the premises, and having such lawful right and title, entered, &c. and evicted him, &c. without shewing what title *A. B.* had; or that he evicted plaintiff by legal process, &c. And Lord *Kenyon* said, "If the declaration be certain to a common intent, that is sufficient. Now it states that *J. B. Pierson*, at the time of the lease made to the plaintiff, and at the time of the

eviction, had lawful right and title to the premises; and having such lawful right and title, entered, &c. I think it would be doing violence to these words to say, that the lawful right and title, which it is stated he had, did not legalise his entry; the fair import of the words is, that he had lawful right and title to do that which he did." *Ashhurst J.* said, "The breach, though not accurately drawn, implies that the plaintiff was lawfully evicted, so as to bring the case within the meaning of the covenant. For, in substance, it is this, that the person who entered had a better title than the defendant, and having such title, entered upon the premises." And *Buller J.* said, "In assigning a breach of covenant, it is sufficient if it be certain to a general intent, and I think this is sufficiently certain; for when it is said, that 'the party having a lawful right and title entered,' it is the same thing as saying, 'he entered by lawful right and title.'" *Grose J.* referred to 1 *Mod.* 294., where *Twisden J.* said, "it is sufficient to say that the party had a *prior title*; not a prior title to enter." And in 1 *Mod.* 101., Lord *Hale* said, "having title at the time" was sufficient.

BOSANQUET J. I am of opinion that our judgment must be for the Plaintiffs. If the Defendant has been legally evicted, the Plaintiffs' claim is defeated; but it appears to me that no legal eviction is shewn upon this plea. The Defendant has pleaded that a forfeiture was incurred by the fact that the business of a retailer of beer had been carried on; and that *R. D. Chantrell*, having good right and title as eldest son and heir of *Chantrell* and wife, evicted the Defendant before the rent claimed in the declaration became due. Now, the mere carrying on the trade of a retailer of beer is not prohibited by the covenant, but the carrying it on without the *Chantrells'* consent in writing; and in order to establish a forfeiture, it should have been averred and proved that

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the trade was carried on without such consent. The prohibition, and the provision which narrows it, are found together in the same clause; and the case falls within the general rule of pleading, which requires, that where a covenant with an exception is contained in the same clause, an assignment of breaches must comprehend the exception as well as the covenant. It has been contended, however, that, at all events, the allegation of forfeiture may be rejected as surplusage, and that the general allegation, that *R. D. Chantrell*, having good title as heir, entered, is sufficient. But where the cause of forfeiture is expressly set out, and appears to be insufficient, no general words can cure the defect: and here, the general words that the party entered, having right as heir of the *Chantrells*, shew no other title than a right to stand in the place of the *Chantrells*. Then, it is alleged that the *Chantrells* had a right to enter, because the business of a retailer of beer was carried on upon the premises, which is insufficient to shew a right of entry, without adding that it was carried on without their consent. It must be observed, too, that this defective allegation is found in a plea, while the cases cited from the *Term Reports* are decisions upon a declaration for breach of a covenant for quiet enjoyment. By the general rules of pleading, greater certainty is required in a plea than in a declaration, and more than ordinary precision is required in a plea which goes to defeat an estate. The cases, therefore, in the *Term Reports* are not necessarily to be considered as over-ruling *Jordan v. Twells*, which was a decision upon demurrer to a plea alleging eviction.

However, it is unnecessary to determine that point: my judgment turns upon the specific ground, that here the Defendant has set up a cause of forfeiture which on the face of the plea was not such as to warrant an eviction.

Judgment for Plaintiffs:

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GIBBENS and Others v. BUISSON and Another. Nov. 17.

THIS was an action of *assumpsit*, brought to recover the sum of 248*l.*, claimed by the Plaintiffs under a charterparty, for demurrage of the ship *Lusitania*. The declaration also contained counts for the carriage and conveyance of passengers, stock, and merchandise; for the use and hire, and for the detention of the ship; and the common money counts.

The parties, by consent, and by order of the Chief Justice, submitted, in pursuance of the statute in that case made and provided, the following case for the opinion of the Court:—

The Plaintiffs were owners of the *Lusitania*, and on the 2d of May 1833, a charterparty was duly signed by them and the Defendants to the following effect:—“It is this day mutually agreed between the owners and master of the *Lusitania*, of 175 tons, now in the port of London, and Messrs. Buisson and Morlett, of London, merchants, that the said ship, being tight, &c. shall receive on board a full and complete cargo of merchandise, and proceed therewith to *Vigo*, and there further receive on board as much live stock as she can with safety to the vessel take on deck; and being so loaded, shall therewith proceed to *Oporto*: and should the master think it possible to enter the port without

Plaintiffs agreed with Defendants to convey a cargo to *Oporto*, and if the river was in possession of an enemy, to unload at *F.*, outside the harbour. The freight was to be 475*l.*; or, if the vessel could enter *Oporto*, discharge, and reload there, 300*l.* only: twenty-five days were allowed for unloading. Plaintiffs arrived at *F.* June the 2d, and, an enemy being in possession of the river, commenced unloading there. The vessel

was detained at *F.*, partly for the convenience of Defendants, and partly by bad weather, till August 25th, and by that time had discharged seven eighths of her cargo. The enemy then having quitted the river, she entered *Oporto*, where she discharged the remaining eighth of her cargo. In July, the Defendants' agent at *Oporto* gave Plaintiffs a bill for the larger freight. In September the vessel obtained, at *Oporto*, a full cargo for England. Held, that Plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June.

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risk from the batteries, he agrees to discharge the cargo there; but if not, he binds himself to proceed off the castle of the *Foz*, or to some other point near the bar, where the vessel can lie in safety, and there discharge into boats, which the freighters bind themselves to send alongside the vessel. To be paid freight, in full for the voyage, the sum of 475*l*. Or, if the vessel can enter *Oporto*, discharge and reload there, then, in lieu thereof, the sum of 300*l*. only. The port and pilotage charges at *Vigo* to be paid by the freighters. The act of God, the king's enemies, restraint and detention of princes and rulers, fire, and all and every the other dangers and accidents of the seas, rivers, and navigation, of what nature or kind soever, during the said voyage, always mutually excepted. The freight to be paid in cash in *London*, upon production of receipts for right and true delivery of the cargo. Twenty-five working days are to be allowed the said merchants (if the ship is not sooner dispatched) for unloading the cargo. Lay days to commence when the ship is off the castle of the *Foz*, or other point where she is to be discharged; continue, whilst there; cease, if blown off the coast by stress of weather, and recommence, when again at anchor at her station: 4*l*. per day demurrage for every day over and above the said laying days. Penalty for non-performance of this agreement, 600*l*. The master to sign bills of lading in the usual manner, and, if required, for more or less freight than above stipulated, without prejudice to this charterparty. The vessel to be consigned to the freighters, or their agents, at the ports of loading and unloading. Five clear days are to be allowed the freighters for taking in the live stock at *Vigo*; and 4*l*. per day demurrage to be paid for every day she is kept longer. Should there be an absolute impossibility of landing the cargo off *Oporto*, it shall be lawful for the master and the freighters' agents to enter into a fresh agreement, without prejudice to this charterparty."

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On the 12th of *May* 1833, the ship sailed from *London* on the voyage mentioned in the charterparty, with a cargo, chiefly of provisions, shipped by or on account of the Defendants, and arrived at *Vigo* on the 28th of the same month, where some oxen, &c. were also taken on board: the ship sailed from *Vigo* on the 2d of *June*, and arrived off the bar of *Oporto* on the next day. The harbour of *Oporto* is about two or three miles up the river *Douro*: when the ship so arrived, the *Miguelites* were in possession of batteries on each side of the entrance of that river; and it was not then possible for her to enter the port without great risk and danger: she was accordingly brought up in the roads off the castle of the *Foz*, just beyond the range of the *Miguelites'* batteries. In pursuance of instructions from the Plaintiffs, the captain made a private signal to inform Signor *Dourado*, of *Oporto*, to whom the cargo was consigned by the Defendants, of the arrival of the ship; and the same day received a letter from *Dourado*, requesting him to unload into boats, sent by *Dourado*, the oxen, &c. taken on board at *Vigo*; and, if there were room, a portion of the flour, which formed part of the ship's cargo.

The ship remained at anchor in the roads, and delivered part of the cargo from time to time, as it was sent for by *Dourado*: but the occupation of the batteries by the *Miguelites* made it difficult and dangerous to discharge the cargo, as the boats had to pass up the river between the batteries, and generally came to the ship during the night. They also came on *Sundays*, and portions of the cargo were delivered to them accordingly, on *Sunday* the 9th and *Sunday* the 16th of *June*. The ship remained at her anchorage, as before stated, without any interruption, from the 3d of *June* until the 14th of *August*, when there were very strong gales and squally weather. The captain was obliged to slip his cable for the preservation of the ship; but he brought her up

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again to the same anchorage on the next morning, and remained there until the 18th of *August*, when, it blowing hard, he sustained some damage from the impact of another ship, and stood out to sea in order to avoid further danger, having on board about one eighth of the cargo undischarged. The gale continued for several days, and the *Lusitania* was beating off and on the coast, and could not return to her former anchorage until the 25th of *August*. The *Miguelites* had then abandoned the batteries, and the river was open, but there was not sufficient wind and tide to enable the ship to cross the bar. The next day there was sufficient water; the *Lusitania* proceeded up the river and came to anchor in the harbour of *Oporto*, where the residue of the cargo was delivered to the order of *Dourado*.

On the 26th of *June* the captain received from *Dourado* a letter, in which he said, "I approve of the expenses you have been at with feeding the men employed in unloading and bringing over your cargo, which I beg you to continue doing until we can settle accounts. In spite of my best endeavours, it has not been possible to hurry on, more than has been done, the unloading. I shall continue with my utmost exertions towards its conclusion."

Only a small part of the outward cargo was discharged by the 29th of *June*; the ship had continued to lie in the roads, at the request of *Dourado*, and to discharge her cargo from time to time as it was sent for by him; and on the 15th of *July* he wrote to the captain in the following terms:—"We have avoided unloading your vessel, owing to the low prices of the articles, and our warehouses being full; however, we send these boats to bring all the barrels of beef they can, and nothing else but these; but if it is absolutely necessary to take out some barrels of flour, then let the lesser possible quantity come."

The sum of 100*l.* was paid by the Defendants to the

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Plaintiffs on the 9th of *May* 1833, in part of the freight of the ship. On the 24th of *July* the captain, on behalf of the Plaintiffs, claimed the payment of the balance of freight for the ship, as having previously become due according to the terms of the charterparty; and *Dourado* then gave him a bill of exchange upon the Defendants for the sum of 375*l.*, which was expressed to be for the "balance of the freight per *Lusitania*."

At the time *Dourado* gave this bill of exchange, he admitted that the ship had been upon demurrage for some time past; and said, that the cargo had come to a bad market, and that the expense of getting the cargo on shore was so heavy that he thought he should keep the *Lusitania* a little longer.

The bill of exchange was remitted to the captain's agent in *London*, who received the amount thereof from the Defendants.

On the 16th of *August* the captain exhorted *Dourado* to discharge the ship; when *Dourado* said, the prices were so low that he did not wish to pay the extra expenses of the boats. *Dourado* was then informed by the captain, that the ship had been on demurrage ever since the 28th of *June*, which he admitted; and the demurrage due was calculated by *Dourado* and the captain.

When the ship entered the harbour she had only about one eighth of her cargo left on board, and the whole of that, except as after mentioned, was delivered in the harbour between the 26th and 29th of *August* inclusive.

One hundred and eighty ores, which had been sent out in the ship by the Defendants, could not be disposed of at *Oporto*; at the request of *Dourado*, the captain agreed to take them back to *England* without any charge; but it was necessary, in order to clear the ship at the custom-house of *Oporto*, that these ores should be landed, which was done by order from *Dourado* on the 30th of *August*; and a barrel of flour, which had before escaped notice, was also landed on the same day; the ship was

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then cleared at the custom-house, and the ores were afterwards again taken on board.

After the delivery of the cargo, *Dourado* was applied to by the captain to give a certificate of the time the ship had been employed; and he then signed the following memorandum on the back of a copy of the charter:—
“Arrived off the bar on the 3d of *June*; the time of contract expired on the 28th of *June*; entered the river on the 26th of *August*, and was cleared on the 30th of *August*.”

The *Lusitania* afterwards obtained a full cargo at *Oporto* for *England*, which she began to take in on the 19th of *September*, and sailed therewith on the 6th of *October*.

In the declaration, which was to be considered as part of the case, the Plaintiffs, after setting out the substance of the charterparty, and averring that the ship being tight, &c. received the cargo on board, stated, that she proceeded therewith to *Vigo*, and there received live stock, &c. and afterwards proceeded on her voyage; that afterwards she arrived at her destination; that the Plaintiffs afterwards discharged the cargo, according to the true intent and meaning of the charter-party, which was then and there accepted by the Defendants; and that the vessel could not enter *Oporto*, discharge and reload there, according to the true intent and meaning of the charterparty.

The Defendants pleaded the general issue, and paid 73*l.* into Court on the count for the use and hire of the ship.

The question for the opinion of the Court was, whether the Plaintiffs were entitled under the circumstances stated in this case, to recover any and what sum from the Defendants, and upon what count or counts; the Defendants being at liberty to object to the admissibility of the evidence of *Dourado's* acts, declarations, and letters stated in the case. The Court was to be at liberty to give

judgment for the Plaintiffs, if they thought there was sufficient evidence to support the Plaintiffs' case, exclusive of any evidence which they thought ought not to have been received. The Defendants were only to take such objections to the declaration as they might have taken at *nisi prius*, or in arrest of judgment. And the Court were to be at liberty to make any amendment which they might think the Judge at *nisi prius* would have allowed.

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R. V. Richards, for the Plaintiffs, contended that, within the meaning of the charterparty, the vessel was discharged at the castle of the *Fox*; and that the Plaintiffs were, therefore, entitled to the larger freight, and to demurrage from the 28th of *June*. But for the directions of the Defendant's agent *Dourado*, who delayed the unloading because the prices at *Oporto* were low and the markets full; the vessel might have been entirely discharged before she entered the port: and the retainer and discharge of one-eighth of the cargo at a later period, for the convenience of the Defendants, did not entitle the Defendants to say the vessel was discharged at *Oporto* within the meaning of the charterparty. The reloading at *Oporto* would not exonerate the Defendants from the larger freight, unless the Plaintiffs had also been enabled to discharge there.

And the conduct of the Plaintiffs' agent, in giving a bill of exchange for the balance of the larger freight, and in admitting that the ship was lying on demurrage, precluded the Defendants from setting up any other construction of the charterparty.

Wightman, for the Defendants. The Plaintiffs are entitled only to the lesser freight. The larger freight was only to be paid in case the vessel discharged entirely without entering the port. But her entering

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the port, and thereby obtaining the chance of a new freight homewards, was the consideration on which the Plaintiffs agreed to accept the lower freight. They did finally discharge in the port, and did obtain there a homeward cargo: the Defendants, therefore, ought to pay only the lesser freight. If the discharge of seven eighths of the cargo outside the port was sufficient to entitle them to the higher freight, notwithstanding they had had the advantage of a homeward cargo, where was the line to be drawn? Would the delivery of a single parcel at the castle of the *Fox* have entitled them to the larger freight, if all the rest of the cargo had been discharged at *Oporto*? The lay days were to commence only at the place of discharge; and if *Oporto* were the place, the Plaintiffs' claim for sixty-two days demurrage was at an end. At all events, a deduction must be made for the *Sundays*. [*Bosanquet J.* The contract is made with reference to the usage of foreign countries.] No usage is stated; and the bill of exchange given by *Dourado* does not affect the case, for the freight was to be paid in cash in *London* upon production of receipts for the delivery of the cargo: the bill, therefore, was given by mistake.

Richards. The extreme case of the Plaintiffs being entitled to the higher freight upon the delivery of a single package outside the port, may be met by the supposition of the Defendants claiming to pay only the lower freight if a single package were delivered within the port, although the bulk of the cargo were discharged outside. The question is, where was the substantial discharge? The intention was, that the Defendants should pay the lower freight only upon the ship being substantially discharged within the port, and reloading there within a reasonable time. But she was kept outside an unreasonable time, for the benefit of the De-

endants; and the inconvenience occasioned to the Plaintiffs by that delay precluded the Defendants from claiming any advantage on account of the subsequent reloading.

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TINDAL C. J. This is a case of some importance, being the first which has been brought before the Court under the recent act of parliament by which parties are authorized to obtain a judicial decision upon a statement of facts agreed to between themselves; — a great improvement in the law, and highly beneficial to the suitor.

The question arises on the construction of a charterparty; and in putting our construction on the instrument, we are bound to give effect to the intention of the parties, as far as it can be collected from the expressions they have used.

And I am of opinion that, according to the terms of this charterparty, the Plaintiffs, in the events which have happened, are entitled to the larger freight.

The charterparty begins, that the vessel being loaded shall proceed to *Oporto*, “and should the master think it possible to enter the port without risk from the batteries, he agrees to discharge the cargo there; but if not, he binds himself to proceed off the castle of the *Foz*, or to some other point near to the bar where the vessel can lie in safety, and there discharge into boats, which the freighters bind themselves to send alongside.” If we go no further, it is manifest that the destination to enter the port or not, and to discharge the cargo inside or outside, was to depend on the circumstances that might determine the mind of the captain, with a view to the safety of the vessel; and it is clear he thought it unsafe to enter, for the case finds that, when the ship arrived off the bar, the *Miguelites* were in possession of the batteries on each side of the river, and it was not possible for her to enter the port without great risk. I should say, therefore, that, as the captain thought

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himself justified in not entering the port, the discharge must be considered to have taken place outside; in which case the charterparty provides "freight in full for the voyage 475*l.*; or, if the vessel can enter *Oporto*, discharge and reload there, 300*l.* only."

The larger freight being due if entry into the port became impossible and the discharge took place outside, the conditions on which the Plaintiffs were to receive the smaller freight are three: that the vessel should, upon arrival, enter the port; that she should discharge there, and reload.

As she did not discharge and reload there upon her arrival off the bar, two of the events contemplated did not arise, and the Plaintiffs are entitled to the larger freight.

The charterparty goes on, — "twenty-five working days are to be allowed the said merchants (if the ship is not sooner dispatched) for unloading the cargo. Lay days to commence when the ship is off the castle of the *Foz*, or other point where she is to discharge; continue, whilst there; cease, if blown off the coast by stress of weather; and recommence when again at anchor at her station."

The instrument, therefore, does not contemplate or provide for the case of the discharge beginning in one place and being concluded in another, but evidently contemplates, that if she be blown off the coast she will return to her former station, that is, outside the port. I point out this stipulation, as tending to shew an intention that the Plaintiffs should have the larger freight, unless, upon arrival, they could enter the port and make their whole discharge there.

It is said that this construction of the agreement might lead to absurd consequences; and an extreme case has been put, of a minute portion of the cargo being discharged outside, and the remainder within the port.

Here, however, the cargo was, in fact, substantially discharged outside: and from the circumstance that one eighth remained to be discharged when at length the ship entered the port, we cannot draw an inference to outweigh all the other stipulations in the charterparty, and, in effect, to make it optional with the Defendants whether they should pay the larger or the smaller freight. Besides, after the Defendants have taken upon themselves to pay the larger freight before the vessel was entirely discharged, we must take it they waived any objection on that head.

It is then contended that the vessel was to discharge at *Oporto*, and that the lay days were not to commence till she was at the place of discharge: but they are not so limited by the language of the charter-party; for they are to commence at the Castle of the *Foz*, or other point where the vessel is to be discharged; to cease if the vessel be blown off the coast; and commence again on her regaining her station.

These considerations arise on the charterparty alone; but when we see that the delay in the discharge arose from the voluntary act of the Defendants' agent, because the markets were low and the warehouses full, it can scarcely be doubted the Defendants have made themselves responsible for the detention of the vessel.

I think, therefore, that the Plaintiffs are entitled to the larger freight, and that the number of days claimed for demurrage has been correctly estimated.

GASELEE J. and VAUGHAN J. concurred.

BOSANQUET J. I am of the same opinion. The Court must put a rational construction on the charterparty: and the parties seem to have contemplated two events for the voyage; the arrival and discharge of the ship off the Castle of the *Foz*, in which case the owners

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were to receive 475*l.* for the freight; and her entry into port and reloading there, in which case they were to receive only 300*l.* As the captain came to the Castle of the *Foz*, and could not enter the port for the greater portion of his discharge, the owners are entitled to the greater freight. It has been urged, that the consideration for the owners' entering into the charterparty, was the advantage of reloading at the port of *Oporto*: no doubt that was part of the consideration; but, on the other side, the risk of lying off the bar, and being beat about in bad weather, was part of the consideration which was to entitle the owners to the higher freight.

Judgment for the Plaintiffs.

Nov. 18.

WAUGH v. ASHFORD.

The Defendant having been committed to the King's Bench prison by a Court of Bankruptcy, this Court gave the bail time to render, notwithstanding the committal was under a *London* commission of bankrupt, and the bail had justified after the bankruptcy, after judgment and at the request of the Defendant's attorney.

THIS action by the indorsee against the acceptor of a bill of exchange, was commenced in *September* 1833.

The Defendant became bankrupt in *London*, in *December* 1833, and the drawer of the bill was appointed one of his assignees.

Judgment in this action was signed on a cognovit, *March* 13. 1834; bail justified on the 14th of *March*; and in *May*, the Defendant was committed to the King's Bench prison by a Subdivision Court of Bankruptcy for not answering satisfactorily; the Plaintiff's attorney, who was one of the solicitors to the assignees, being present, and assisting in making out the committal.

Under this committal, the Defendant still continued in confinement.

In *April*, a *ca. sa.* in the action was lodged against him;

and at the request of the Defendant's attorney.

and on the 6th of *June*, after the return of the *ca. sa.*, the bail, who had justified at the request of his attorney, were served with the copy of a writ of *sci. fa.* returnable on the 12th of *June*.

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AMERSON.

On the 11th of *June*, in last *Trinity* term,

Price, on behalf of the bail, obtained a rule, calling on the Plaintiff to shew cause why, under the circumstances above stated, the bail should not have time to render their principal.

The time required was, till he should have passed his last examination.

Wilde Serjt. and *Channell* shewed cause.

The Court will not enlarge the time for rendering bail, except under peculiar circumstances; and there is nothing which gives the bail in the present case any claim to indulgence. It has been refused, where the principal could not be removed without endangering his life; *Wynn v. Petty* (a); where he has become lunatic; *Cock v. Bell* (b); and even where he has been unwarrantably detained by a foreign enemy; *Grant v. Fagan* (c): it has been granted in cases of bankruptcy, only where the commission has been sued out in the country, and in order to avoid the expense of bringing the bankrupt to *London*. *Maude v. Jowett* (d), *Shaw v. Cash*. (e) Here the bail did not justify till after judgment against their principal, and till three months after he had become a bankrupt; they were aware, therefore, of the responsibility they incurred, and after the return of the *ca. sa.* have no claim to the favour of the Court. In *Gibson v. White* (g), the application was made before the bail had

(a) 4 *East*, 102.(e) 4 *Bingh.* 80.(b) 13 *East*, 355.(g) 2 *Cr. & J.* 85. 2 *Tyresh.*(c) 4 *East*, 189.

162.

(d) 3 *East*, 145.

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justified; and previous to justification more latitude is allowed. If the present rule be made absolute, the surrender may, by the Defendant's refusal to answer, be delayed to an indefinite time.

Bompas Serjt. and Price, contra. If this had been an action in the Court of King's Bench, it would have been a matter of course, upon the Defendant's being committed by the commissioners of bankrupt, to bring him up under a *habeas corpus* from the criminal custody of that Court, and render him in discharge of his bail. The Court of Exchequer and this Court have no authority to interfere with the criminal custody of the Court of King's Bench; *Currie v. Kinnear.* (a) In order, therefore, that the suitor of those Courts may be put on an equal footing with the suitors of the Court of King's Bench, it has been usual in those Courts to give the bail time to render the principal, wherever, in the Court of King's Bench, he might have been rendered under a *habeas corpus*. *Hodgson v. Temple* (b), *Ashmore v. Fletcher.* (c)

Cur. adv. vult.

TINDAL C. J. The application which has been made in this case, that the bail shall have time to render their principal till he shall have passed his last examination, is without any precedent. Yet there are circumstances in the case which may induce us to accede to the application to a small extent.

It is clear that, if these circumstances had occurred in the Court of King's Bench, the bail would have had an easy remedy by bringing up their principal under a writ of *habeas corpus*, and then rendering him in discharge.

By the constitution of this Court we are unable to

(a) 1 B. & B. 23.

(b) 5 Taunt. 503.

(c) 13 Price, 523.

proceed in that course, but the practice has been to come as near to it as our jurisdiction will permit.

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We are not disposed to accede to the application to the full extent to which it has been made, because it might enable the parties to lie by, instead of using all the means in their power to accelerate a surrender; but we think it right to suspend the proceedings on the *scire facias* till the fifth day of next term.

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We shall narrowly watch the conduct of the parties in the mean time, but it is expedient that the practice of the Courts should be assimilated as nearly as possible.

Rule absolute accordingly.

DAVIDSON v. CHILMAN.

Nov. 18.

TO debt in this Court for goods sold, the Defendant pleaded that he was an attorney of the Court of King's Bench, and prayed judgment if this Court would or ought to take cognizance, &c.

A plea of privilege, as attorney of another court, is a plea in abatement, and if it be not verified by affidavit, Plaintiff may sign judgment.

He made no affidavit of the truth of this plea; whereupon

The Plaintiff signed judgment, which

Talfourd Serjt. obtained a rule *nisi* to set aside as irregular.

Wilde Serjt., who shewed cause, contended, that this was a plea in abatement; and, as such, might be treated as a nullity, if not verified by affidavit pursuant to 5 Ann. c. 16. s. 11. In *Horsfall v. Matthewman* (a), where the Court set aside a judgment signed after a plea

(a) 3 M. & S. 154.

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in abatement, there *was* an affidavit, though in some respects objectionable.

Talfourd. All pleas to the jurisdiction of the Court do not require to be verified by affidavit: there is nothing in this plea, of which the Court is not apprised without affidavit; as, the existence of the privilege, and the entry of the Defendant's name on the rolls of the Court: and the statute of *Anne* applies only to matters *dehors* the record, and not to such as appear to the Court on inspection of their own proceedings: *Hughes v. Alvarez.* (a) Nor ought such a plea as this to be classed with pleas in abatement; for it is neither to the disability of the Plaintiff, nor to the person of the Defendant, nor in abatement of the writ. Indeed, a plea concluding with a prayer of judgment if the Court will take cognizance, &c. is not considered even as a plea to the jurisdiction; *Chatland v. Thornley* (b), *Stokes v. Mason.* (c) And a plea of the statute of additions has been held not to require verification by affidavit; *Gray v. Sidneff.* (d) At all events, the plea, if informal, was not a nullity; and, instead of signing judgment, the Plaintiff should have moved to set the plea aside; *Horsfall v. Matthewman.*

TINDAL C.J. A plea of privilege as attorney of another Court, is classed under pleas in abatement by *Comyns*; *Com. Dig. Abatement* (D) 6. It is a subordinate division of the class of pleas in abatement; and, if not verified by affidavit, may be treated as a nullity.

BOSANQUET J. referred to *Stiles v. Serjeant Mead* (e), and *Cunningham v. Johnson.* (g)

Rule discharged.

(a) 2 *Ld. Raym.* 1409.

(b) 12 *East*, 544.

(c) 9 *East*, 424.

(d) 3 *B. & P.* 397.

(e) 2 *Str.* 738.

(g) *Say.* 19.

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DUDDEN v. LONG.

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THE sheriff of *Wilts* having been ruled to return a *f. fa.* issued against the Defendant,

The Court refused to interfere in favour of the sheriff, under the interpleader act, where the under-sheriff's partner appeared to be concerned for some of the parties.

A rule *nisi* was obtained, on the sheriff's behalf, for a stay of proceedings, and for the Plaintiff and the assignees of the Defendant, who had become a bankrupt, to appear under the interpleader act, and state the nature of their respective claims.

The Defendant's goods had been seized and sold under the *f. fa.*, and the produce still remained in the hands of the sheriff.

Ludlow Serjt., for the Plaintiff, shewed cause on an affidavit from the Plaintiff's attorney,

That the *f. fa.* had been lodged at the office of the under-sheriff of *Wilts* on the 30th of *September*, when a gentleman, who carried on business as a solicitor, in partnership with the under-sheriff, said the writ would have priority, as a *f. fa.* issued against the same Defendant by one *W. D. W.* had been returned for irregularity: that deponent gave orders for a bill of sale, and, by appointment, called for it the next day at two o'clock; no person, however, was then at the under-sheriff's office: but at seven the same evening, upon deponent's calling again, the under-sheriff's partner demanded an indemnity, saying, execution had that day been levied on the Defendant's goods at the suit of *W. D. W.*:

The indemnity being refused, the under-sheriff's partner said the under-sheriff was not bound to sell without a *venditioni exponas*, and required deponent to wait for a week, when he should hear whether the under-sheriff would sell or not:

3. H. v. N. 823.

x 4

9. 2. 1834. 342

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On the 6th of *October*, deponent received a letter from the under-sheriff, dated the 4th, and stating that the Defendant had committed an act of bankruptcy, and that the papers were gone to *London* for a *fiat* :

On the 6th, a *fiat* was issued against the Defendant, to which *fiat* the under-sheriff's partner was solicitor; *W. D. W.* and the under-sheriff's brother, two of the commissioners; and the *fiat* was opened in the office of the under-sheriff and his partner.

Ludlow contended that, under these circumstances, the Court would not interpose to relieve the sheriff from any responsibility.

Coleridge Serjt. was heard in support of the rule. It is no imputation on the under-sheriff that his brother acted as commissioner in the bankruptcy, the commissioners of bankrupt in the country being appointed by the Judge of assize to a given district; and within that district, no others can act.

TINDAL C. J. Before we accede to any application, under the interpleader act, on behalf of the sheriff, we must see that he stands quite clear of any connection with either of the parties. We do not see how we can say that here, where the under-sheriff is, in effect, the attorney for the assignees under the commission of bankrupt. It seems to us that, where there is such an intermingling of the characters of attorney and under-sheriff, the proceedings ought to go on.

The rest of the Court concurring, the rule was

Discharged.

On a subsequent day, the Court, upon the application of *Coleridge*, allowed the sheriff four days to make his return to the *fi. fa.*

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WILKINSON, Executrix of BEVAN, v. EDWARDS. Nov. 18.

THIS was an action by the executrix of a payee, against the maker of a promissory note.

The payee died in *June* 1831. The maker's signature was attested; and the maker, payee when alive, and attesting witness, all lived in *Monmouthshire*.

The Plaintiff, nevertheless, laid her venue in *Middlesex*, thinking, as she alleged, that the action would be undefended.

In *Hilary* term 1834, a rule for judgment as in case of a nonsuit was discharged, on the Plaintiff's giving a peremptory undertaking to try at the next sittings.

In the *February* following, the Plaintiff's attorney asked the Defendant's attorney the nature of his defence, and to admit the Defendant's handwriting.

The Defendant's attorney refused to make the admission, and said his client did not owe the money.

The Plaintiff's attorney made a similar application in *April*, which met with a similar answer, when he offered to change the venue into *Monmouthshire*.

In *Easter* term last, a second rule for judgment as in case of a nonsuit, was discharged upon a second undertaking to go to trial; which undertaking having been broken, and judgment as in case of a nonsuit having been entered up,

Aitcherley Serjt. obtained a rule *nisi* to stay proceedings, in order that the Plaintiff, as executrix, might be exempted from costs. 3 & 4 *W. 4. c. 42. s. 31.*

Wilde Serjt., who shewed cause, after animadverting on the circumstance of the Plaintiff's laying the venue in

Where an executrix commenced an action with temerity, and prosecuted it recklessly, laying the venue in *Middlesex*, notwithstanding all the parties lived in *Monmouthshire*, and twice violating a peremptory undertaking to try, the Court refused to exonerate her from costs.

1834. *Middlesex*, when the parties lived in *Monmouthshire*; on the breach of two peremptory undertakings to try; and on the temerity with which the action had been brought; contended, that it was not a case for the interposition of the Court in favour of the executrix.

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Atcherley insisted that the discretion of the Court should be exercised under the recent statute, upon the same principles as before the statute; and in *Woolley v. Sloper (a)*, it was held that, upon a judgment as in case of nonsuit, an executor Plaintiff, who had been guilty of wilful negligence, was not liable to the costs of the cause, but only to the costs occasioned to the Defendant by such wilful negligence.

It was the duty of the executrix to sue, and her failure in that respect might amount to a *devastavit*.

TINDAL C. J. Before the statute 3 & 4 W. 4. c. 42., executor Plaintiffs were not liable to costs on a nonsuit or verdict for the Defendant: not from express exemption by any law, but owing to the particular mode in which the language of the statutes giving costs to Defendants was expressed. For on looking into the statute 23 H. 8. c. 15. s. 1. we find that costs are given to the Defendant, where the Plaintiff is nonsuited, or a verdict passes against him, in actions on contracts *immediately* with, or for wrongs *immediately* done to, the Plaintiff. That statute was extended to all personal actions, by 4 Jac. 1. c. 3.; which being framed on the model of 23 H. 8. c. 15., it has been holden, that executors and administrators are neither within the one nor the other, inasmuch as the contract on which they sue is not made immediately with themselves, but with their testator or intestate.

(a) 9 Bingham 754.

The 3 & 4 W. 4. c. 42. was intended to amend this defect in the law, by enacting, "that, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, *unless the Court in which such action is brought, or a Judge of any of the superior Courts shall otherwise order*, be liable to pay costs to the Defendant, in case of being nonsuited, or a verdict passing against the Plaintiff; and in all other cases in which he would be liable, if such Plaintiff were suing in his own right, upon a cause of action accruing to himself; and the Defendant shall have judgment for costs, and they shall be recovered in like manner."

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The general rule, therefore, now is, that an executor or administrator who has been nonsuited, or who has lost a verdict, is liable to costs; and it is cast on *him* to make out that there are particular circumstances in his case which would justify the Court in exempting him by an exercise of their discretionary authority. We must therefore look to the course and conduct of the executor in the particular case. It is said to be his duty to sue, in order to collect the testator's assets: but it is his duty first to consider whether there be a fair prospect of success in the action.

Here the Plaintiff appears to have failed, because she was unprovided with proof of the Defendant's handwriting; but she should have secured that before she ventured to sue. To say the least, therefore, the action was a hasty proceeding. Then, although the cause of action substantially existed in *Monmouthshire*, she lays the venue in *Middlesex*, and twice neglects a peremptory undertaking to try. All these are proceedings which have a tendency unnecessarily to increase expense to the Defendant. We think, therefore, it is not a case in which, in the exercise of its discretion, the Court ought to interpose in favour of the Plaintiff.

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GASELEE J. As no pains appear to have been taken before the action, to obtain proof of the Defendant's handwriting, and the peremptory undertaking to try has been twice broken, I think this rule ought to be discharged.

VAUGHAN J. The statute 3 & 4 W. 4. c. 42. was passed to remedy a gross abuse, and it is now thrown on the executor to make out his case for exemption from costs. No ground has been shewn here for such indulgence; the action appears to have been hastily commenced, and unnecessarily continued.

BOSANQUET J. It is incumbent on a Plaintiff who seeks relief under this statute, to shew a satisfactory ground why he should claim to be exempted from costs.

For the reasons given by the Court, I think that has not been done on the present occasion.

Rule discharged.

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POWER v. IZOD, Administrator of IZOD.

1. The rule of *Hil. 4 W. 4.*, which requires the party who pleads a plea of judgment recovered, to set out its date &c. in the margin of

IN bar of this action, the Defendant pleaded two judgments recovered against him, in his capacity of administrator; one in the Court of King's Bench, the other in the Exchequer; but omitted to set out, in the margin of the plea, the date of the judgments or the number of the roll.

For this omission the Plaintiff signed judgment, which

the plea, does not apply to a plea of judgment recovered against an executor.

2. Barristers under the degree of the Coif, are, as well as Serjeants, competent to sign pleas in the Court of Common Pleas.

Wilde Serjt. obtained a rule *nisi* to set aside for irregularity.

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Bompas Serjt., who shewed cause, relied on the rule *Hil. 4 W. 4.* “Where a defendant shall plead a plea of judgment recovered in another Court, he shall, in the margin of such plea, state the date of such judgment, and, if such judgment shall be in a court of record, the number of the roll, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea.” He also objected that the plea was not signed by a Serjeant. Although the Bar at large were now admitted to practise in the Court of Common Pleas, nothing had been done to alter the rule which required a Serjeant’s signature to a plea.

TINDAL C. J. The rule of *Hil. 4 W. 4.* is not expressed with perfect precision; but on reading it, I should have thought it applied to the common plea of judgment recovered for the same cause of action, and such must be taken to be the meaning of the rule.

The present plea is, in effect, a plea that the Defendant has not sufficient assets to answer the Plaintiff’s demand.

As to the second objection, the order by which the Bar in general are admitted to practise in the Court of Common Pleas is without qualification, and enables them to discharge there every duty of an advocate.

The rest of the Court concurred.

Rule absolute.

1834.

Nov. 19. SIMS and Another, Assignees of BARNARD, an Insolvent, v. SIMPSON.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee under 7 G. 4. c. 57., passes only such property as the insolvent has at the time of the assignment.

IN July 1831, *Barnard* took from the Defendant, under a lease, certain premises at a rent of 32*l.* 5*s.* a year. He also paid down 100*l.* as a deposit, by way of security for the rent.

On the 13th of *April* 1832, he went to prison insolvent;

On the 14th, he surrendered to the Defendant the premises he had occupied as above, and sold to him certain fixtures at a valuation of 60*l.* 1*s.* 4*d.*;

On the 18th, upon his petition to the Insolvent Debtors Court, his estate and effects were assigned to the provisional assignee of that Court;

And, in the following *October*, to the Plaintiffs; who by this action of *assumpsit* for fixtures sold, and for money had and received, sought to recover the above 60*l.* 1*s.* 4*d.*, the value of *Barnard's* fixtures transferred by him to the Defendant, and the 100*l.* deposited with the Defendant as a security for rent.

In one count it was alleged that the fixtures were sold by *Barnard*; in another, by the assignees.

The Defendant pleaded, and established, a set-off for rent due to him from *Barnard*, to a greater amount than 160*l.* 1*s.* 4*d.*

It was objected, on the part of the Plaintiffs, that the assignment under the Insolvent Debtors Act had a relation to the first day of the insolvent's imprisonment; it being enacted by sects. 30. and 32. of 7 G. 4. c. 57., "that if any person, who shall petition the Court for his or her discharge from imprisonment under this

5 De G. M. C. 494 394

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act, shall, at the time of his or her arrest, or other commencement of such imprisonment, by the consent and permission of the true owner thereof, have in his or her possession, order, or disposition, any goods or chattels whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said Court, by the conveyance and assignment executed in pursuance of this act.”—“ If any prisoner, who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with a view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act.” Whereupon,

A verdict was taken for the Defendant, with leave for the Plaintiffs to move to set it aside, and enter, instead, a verdict for the Plaintiffs.

1834.

Andrews Serjt. having obtained a rule *nisi* accordingly,

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Wilde and *Atcherley* Serjts. and *Butt* shewed cause.

1st, The Plaintiffs, having sued in *assumpsit*, are precluded from objecting that the insolvent had not authority to sell the fixtures in question. To have raised that objection, they should have sued in *trover*. By suing in *assumpsit*, they have affirmed the contract with the Defendant, and let in his set-off; *Smith v. Hodson* (a), *Thorpe v. Thorpe*. (b)

2dly, The insolvent was the real, not the merely reputed owner of the fixtures; the Plaintiffs have no claim, therefore, under sect. 30.

Nor under the thirty-second, because the transfer, being unaccompanied with fraud, and for a valuable consideration, was not voluntary within the meaning of that section. By the eleventh section, the prisoner is directed to execute, at *the time of his petition*, a conveyance to the provisional assignee of all his estate and effects; that is, of the estate he possesses at the time of his petition: the thirty-second section repels any presumption that such conveyance is to have a retrospective effect; for if, under section 11., all property were held to pass, which the insolvent had at the commencement of his imprisonment, section 32. would be unnecessary, — as would also the various provisions in the act against fraudulent transfers: and *Hepper v. Marshall* (c) is a strong case to shew that, under the assignment to the provisional assignee, nothing passes but what the prisoner has at the time. That case was decided upon the construction of 1 G. 4. c. 119.; but the language of that act, with respect to the assignment, is nearly the same as that of 7 G. 4. c. 57. *Herbert v. Wilcox* (d) only

(a) 4 T. R. 211.
(b) 3 B. & Adol. 580.

(c) 2 Bingham. 372.
(d) 6 Bingham. 203.

decided that a voluntary payment by the insolvent to a creditor, within three months of the imprisonment, was fraudulent and void within section 32. of 7 G. 4. c. 57.; *Sharpe v. Thomas* (a), that a warrant of attorney, given by one who intends to take advantage of that act, is a charge on land, under the same section. In *White v. Bartlett* (b), where defendant, an auctioneer, employed by C., a person in embarrassed circumstances, to sell his property, sold, and paid the proceeds to C.'s order; C. having shortly afterwards been declared insolvent, it was held, that defendant was not liable to C.'s assignees, although the defendant, when he sold the property, was aware of C.'s embarrassment.

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Andrews Serjt. and *Cresswell* in support of the rule.

1st, The objection to the form of action was not taken at the trial; and, assuming the articles to have been sold by the insolvent as agent of the assignees, they may recover the value as money had and received to their use, without affirming the contract of sale; *Hill v. Perrott* (c), *Abbotts v. Barry*. (d) In such case there are no mutual dealings to let in the Defendant's set-off.

2dly, These articles were the property of the assignees; for the transfer of them, the day before the assignment, to the provisional assignee, must, in the insolvent's circumstances, be deemed fraudulent.

At all events, the assignment has relation to the first day of the imprisonment. It is true, there is no express enactment that the assignment by an insolvent shall so operate by way of relation: but the language of sect. 11. of the insolvent act requires that the *prisoner*, at the time of signing his petition, shall execute a convey-

(a) 6 Bingham. 416.
(b) 9 Bingham. 378.

(c) 3 Taunt. 274.
(d) 2 B. & B. 369.

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ance to the provisional assignee, which shall vest in him "all the real and personal estate and effects of such *prisoner*, and all the *future* estate and effects which shall come to such prisoner before his final discharge: this corresponds with the language of sect. 63. of the bankrupt act, 6 G. 4. c. 16., which enacts, "that the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the *present* and future personal estate of such bankrupt, where-soever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate;" and under which, notwithstanding the use of the word *present*, the property of the bankrupt always passes with relation to the act of bankruptcy.

Again, sect. 16. of the insolvent debtors act, speaking of the estate of every such *prisoner*, must be taken to mean any estate he is possessed of while in prison.

Sect. 30., which gives his assignees property of which he has the apparent ownership and disposition, expressly refers to the commencement of the imprisonment; and the corresponding provision in sect. 72. of the bankrupt act has been held, even without express words of relation, to relate to the act of bankruptcy.

In like manner, sect. 31. of the insolvent debtor's act, which provides that distresses shall not be available for more than one year's rent, refers to distresses made after the commencement of the imprisonment. But such reference would be superfluous, if the property remained vested in the insolvent to the time of his petition; and that section corresponds with sect. 74. of the bankrupt act, which enacts, that "no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt (whether before or after the issuing of the commission), shall be available for more

than one year's rent accrued prior to the date of the commission."

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Unless the assignment have relation to the first day of the imprisonment, the insolvent might, under the thirty-second section, dispose of his own goods, to the injury of his creditors, till the day of his petition; while, under sect. 30., the goods of others, of which he had only the apparent ownership, would pass irrevocably to his assignees from the day he went to prison.

TINDAL C. J. This is an action by the assignees of an insolvent debtor to recover the value of certain fixtures alleged in one count of the declaration to have been sold by the insolvent, and in another, by the Plaintiffs, his assignees, to the Defendant.

The Defendant established, at the trial, a set-off for rent due to him from the insolvent, to a greater amount than the sum now sought to be recovered. It has also been contended to-day, that if the Plaintiffs seek to recover on the ground that nothing passed by the sale from the insolvent to the Defendant, their form of action has been misconceived, and that they should have sued in trover instead of *assumpsit*. That objection, however, was not raised at *nisi prius*, and the only point we are called on to decide, is, whether, under the insolvent debtors act, the assignment of the petitioner's estate and effects has relation back to the first day of his imprisonment.

In the present case, the insolvent went to prison on the 13th of April; sold the fixtures in question to the Defendant on the 14th; on the 18th, his estate and effects were assigned to the provisional assignee; and in the following October to the Plaintiffs, as permanent assignees.

If the property in the fixtures in question passed to them by relation, from the 13th of April, the first day

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of the insolvent's imprisonment, the Defendant on the 14th purchased, not the goods of *Barnard*, but the goods of the Plaintiffs.

But upon the best consideration we can give to the question, we think that, under the insolvent debtors act, the assignment has no such relation back.

First, the eleventh section directs a conveyance, by the following words: "That such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said Court, in such form as is to this act annexed, of all the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner;" — "which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee."

And if the whole had turned on this section, there is nothing in it to shew that the conveyance is to be more operative than any conveyance between ordinary parties. Unless, therefore, some other clause shew an intention on the part of the legislature that the conveyance should have a relation back, it passes no more than the insolvent possessed at the time.

It is said, that the use of the word *prisoner* implies that the assignment should pass whatever he possessed at the time he became a prisoner; but the word prisoner is used only to identify the person, and not to give a retrospective effect to his acts.

It is said, that under the sixty-third section of the bankrupt act, by which the commissioners are authorised to assign to the creditors "all the *present* and future personal estate of such bankrupt," every thing passes

which the bankrupt possessed from the time of the act of bankruptcy, provided it were not more than two months before the commission; and that, *à fortiori*, all that the insolvent possessed at the time of the imprisonment ought to pass to his assignees by virtue of the corresponding section of the insolvent debtors act, which is not qualified even by the word *present*. However, the relation to the act of bankruptcy in the conveyance of a bankrupt's effects does not depend on sect. 63. of 6 G. 4. c. 16., but on an earlier and more powerful section (the 12th), by which it is enacted, that "the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed any act of bankruptcy, by any creditor or creditors of such trader, by commission under the great seal, to appoint such persons as to him shall seem fit, who shall, by virtue of this act and of such commission, have full power and authority to take such order and direction with the body of such bankrupt, as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, which he shall have in his own right before he became bankrupt, and with all his money fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known, and to make sale thereof in manner hereinafter mentioned."

The sixty-third section, therefore, can have no other effect than to enable the assignees to exert the same retrospective power which the Chancellor is authorised by sect. 12. to confer on the commissioners. But no such power is conferred by sect. 11. of the insolvent debtors act.

It is then said that, by the sixteenth section of the insolvent act, "It shall and may be lawful for the provisional assignee of the said Court to take possession himself, or by means of a messenger of the said Court, or other person or persons appointed by him, of all the

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GASELEE J. I am of opinion that, by the assignment to the provisional assignee, only such property passes as the insolvent has at the time of the assignment. For the purpose of preventing fraud, there are clauses in the insolvent debtors act, which, in certain cases, vest in the assignees what the insolvent had at the time of his imprisonment. But no fraud is suggested in the present case; and those clauses would have been unnecessary, if the insolvent could not, *bonâ fide*, make any transfer previously to the assignment.

VAUGHAN J. I am of the same opinion. Neither by express words, or necessary intendment, is the relation contended for to be collected from the act. At all events, according to *Smith v. Hodson*, the assignees, by suing in *assumpsit*, have affirmed the insolvent's contract, and then the creditor may set off his debt.

BOSANQUET J. The single question before us is, whether the property in the fixtures in question was vested in the assignees of the insolvent from the commencement of his imprisonment; for if not, the insolvent did not sell as their agent; and the Defendant, as against the insolvent himself, is entitled to a set-off.

Now, there are no words in the insolvent act which indicate any such relation to the commencement of the imprisonment.

It is said, however, that the clause in the bankrupt act, under which the bankrupt's property passes to his assignees, is similar, in expression, to the clause which directs the assignment of the insolvent's property; and that, under that form of expression, the property of the bankrupt passes from the time of the act of bankruptcy. But the operation of the assignment under the bankrupt act, does not depend on the sixty-third section alone, which directs the assignment, but on the twelfth

section also, by which it is enacted, "that the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed an act of bankruptcy, by any creditor or creditors of such trader, by commission under the great seal, to appoint such persons as to him shall seem fit, who shall, by virtue of this act and of such commission, have full power and authority to take such order and direction with the body of such bankrupt, as hereinafter mentioned, as also with all his lands, tenements, and hereditaments, which he shall have in his own right before he became bankrupt; and with all his money fees, offices, annuities, goods, chattels, wares, merchandise, and debts, wheresoever they may be found or known, and to make sale thereof in manner hereinafter mentioned."

And there is this difference between the insolvent laws and the bankrupt laws,—that the bankrupt laws operate *in invitum*, whereas the insolvent law is put in force by the voluntary act of the insolvent. When the insolvent assigns his property, he is entitled to the benefit of the act; and the assignment made, takes effect on all property in the insolvent's possession.

Undoubtedly there are various clauses in the insolvent debtors act directed towards the prevention of fraud; and when a conveyance is made by the insolvent with a fraudulent intent, the act sets it aside: in the bankrupt act, the nullity of a conveyance within two months of the date of the commission does not depend on fraud, but on its being subsequent to the act of bankruptcy. I cannot find in the insolvent debtors act any such relation, express, or implied, to the commencement of the imprisonment; and therefore this rule must be

Discharged.

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Nov. 19.

COWNE v. GARMENT.

A memorandum signed by the lessee on the margin of a lease, and stating that the lessee was to be tenant and pay rent for a period of six weeks antecedent to the term granted by the lease, Held admissible in evidence on the part of the lessor, to shew the amount of rent due.

ASSUMPSIT for money had and received.

The Plaintiff occupied a house under a lease from the Defendant, and being distrained upon for rent arrear, came to an account with the Defendant; upon which accounting he had, as he alleged, paid by mistake 12*l.* 10*s.*—half a quarter's rent—too much.

This sum he sought to recover by the present action.

At the trial before the under-sheriff of *Middlesex*, the Defendant offered in evidence the counterpart of a lease, by which the premises had been demised to the Plaintiff from *Michaelmas* 1832, at 100*l.* a year.

On the margin of this lease was the following memorandum, signed by the Plaintiff: "It is hereby understood that Mr. *Cowne* is to be tenant and pay rent from the 12th of *August* 1832."

The under-sheriff told the jury that they must look to the body of the lease alone, and that the memorandum was not admissible in evidence. Whereupon

A verdict was found for the Plaintiff, for 12*l.* 10*s.*, with leave, however, for the Defendant to move to enter a nonsuit instead, if, as it was objected on the part of the Defendant, the action ought to have been case for an excessive distress, or the memorandum had been improperly excluded.

Petersdorff having obtained a rule *nisi* accordingly, citing *Lindon v. Hooper* (a),

Justice shewed cause. In *Lindon v. Hooper*, the money sought to be recovered, had been paid to release

(a) *Cowp.* 414.

cattle damage feasant. That case, therefore, is inapplicable to the present. But in *Feltham v. Terry*, cited in that case (p. 416.), the words of the Court were these: "It is manifest the taking was tortious, and that the plaintiff might have brought an action of trespass. But we all think he may waive the *tort*, and go for the money clearly due; and if he does, it is a benefit to the defendant, because he can then recover no more than in equity he is bound to receive." See also, *Com. Dig. Assumpsit*.

The distress here was not irregular; the Plaintiff, therefore, could not have sued in case under 11 G. 2. c. 19. Nor could he sue under the statute of *Marlbridge* for an excessive distress, when the excess was so small as 12l. 10s. Whether the memorandum was admissible in evidence or not, its rejection does not entitle the Defendant to enter a nonsuit.

Wilde Serjt. and Petersdorff in support of the rule.

The Plaintiff, if the Defendant demanded too much on occasion of the distress, ought to have replevied, or to have sued for the excess, under the statute of *Marlbridge*; and in such action he would not have been confined to any precise sum; *Sells v. Hoare*. (a)

At all events, he cannot recover in an action for money had and received, a sum paid upon drawing up an account, with full knowledge of all the circumstances to which the account related; *Bilbie v. Lumley* (b), *Longridge v. Dorville* (c); or paid for the purpose of ending a dispute; *Stracy v. The Bank of England* (d), *Marriott v. Hampton*. (e)

TINDAL C. J. It is clear that the verdict ought not to stand without further enquiry, because the undersheriff has rejected evidence which he ought to have

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(a) 1 Bingham 401.

(b) 2 East, 469.

(c) 5 B. & Ald. 117.

(d) 6 Bingham 754.

(e) 7 T. R. 269.

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received. At the same time I am not prepared to say we can go so far as to order a nonsuit. The parties having come to an account in which the Defendant stated the demand for the rent of a house in the Plaintiff's occupation, and the Plaintiff having acquiesced, I cannot see that the case of *Lindon v. Hooper* applies with such certainty as to authorize a nonsuit. The other points were not reserved, nor was the rule granted on them. There must be a new trial.

The rest of the Court concurred.

Rule absolute for a new trial.

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USBORNE and Another v. PENNELL.

After a rule to plead in *Easter* term, in an action on a bill of exchange, Defendant paid a portion of the bill, with costs to that time, and agreed to pay the residue with the costs of the action, the 1st of *October* following, if it were not previously paid by another

THIS was an action by the indorsees, against the indorser of a bill of exchange for 600*l.*, due *April* 6th, 1834. The action was commenced *April* 19., *Easter* term, and a rule to plead was given in the same term.

On the 28th of *April*, the Defendant commenced an action of trover against the Plaintiffs for the same bill.

On the 12th of *May*, the Defendant, having obtained a summons for further time to plead in this action,

Agreed to pay to the Plaintiffs, at once, 200*l.* towards the bill, and if the drawer or his trustees did not discharge the residue of the bill in the following *September*, the Defendant was to pay it on the 1st of *October*, together with the costs of this action; the intent being, that the Plaintiffs should receive the whole amount due, with interest and costs; and, if they pleased, should sign

party: no payment having been made according to the agreement, Held, that Plaintiff might sign judgment in *Michaelmas* term, without a fresh rule to plead.

a composition-deed with the drawer, without releasing the Defendant from his liability on the bill.

The Defendant paid this 200*l.* with costs up to the time of payment: among which costs, was a charge for "attending Defendant on settlement of suit."

The drawer and the Defendant having omitted to discharge the bill by the 1st of *October*, the Plaintiffs, without giving any new rule to plead, signed judgment; which

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Talfourd Serjt. obtained a rule *nisi* to set aside for irregularity, contending that the action had been settled by the agreement of *May* 12. He urged, also, that the judgment not having been signed of the same term the rule to plead was entered, but the cause having stood over to another term, without further proceedings, a new rule to plead ought to have been entered before the Plaintiff could sign judgment; for judgment ought, in general, to be entered of the same term in which rules are given. (a)

Wilde Serjt., who shewed cause, maintained that the action was not settled, but suspended conditionally; and that the Defendant having neglected to observe the condition, the Plaintiffs were remitted to the situation in which they stood when the action was suspended. A new rule to plead was therefore unnecessary; *Puckford v. Maxwell* (b), *Penfold v. Maxwell* (c), *Cantellow v. Truman*. (d) In *Pryer v. Smith* (e) it was held, that where the declaration was delivered in term, judgment might be signed in the following term for want of a plea, without giving a rule to plead of the term of which the judgment was signed. *Mould v. Murphy* (g) is to the same effect.

(a) See *Tidd's Pr.* 422.(b) 6 *T. R.* 52.(c) 1 *Chitt. Rep.* 275. n.(d) 2 *Dowl. Pr. C.* 2.(e) *Id.* 114.(g) *Id.* 54.

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Talfourd. The agreement of the 12th of *May* was a settlement of the action, as appears from the charge for a settlement, in the bill of costs.

At all events, the suspension of proceedings by virtue of the agreement did not authorize the Plaintiffs to sign judgment without a fresh rule to plead, when the time given by the agreement had expired.

TINDAL C. J. After this agreement; which amounts to a *cognovit*, there cannot be any defence to the action, and no merits are suggested. The Defendant pays down, with costs, a portion of the sum sought to be recovered, and engages to pay the remainder by the 1st of *October*.

Upon his failing to do so, the whole agreement falls to the ground, and the Plaintiffs are remitted to their former *status*. Upon the same principle, in *Puckford v. Maxwell*, the defendant having failed to perform the agreement he entered into upon being arrested, the plaintiff was allowed to arrest him anew upon the same affidavit of debt. Our decision, therefore, is called for on the single ground of an alleged irregularity in signing judgment without a fresh rule to plead. Where the merits are with the Plaintiffs, we should be sorry to set aside the judgment on such grounds, and *Pryer v. Smith* relieves the Court from that difficulty. That case decisively shews that there has been no irregularity.

The rest of the Court concurred, and the rule was
Discharged.

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MOORE v. BOULCOTT.

Nov. 20.

THE Plaintiff declared that the Defendant was indebted to the Plaintiff for the work and labour of the Plaintiff, by him bestowed as the attorney and solicitor of and for the Defendant, in drawing, copying, and engrossing of divers deeds and writings for the Defendant; and in and about other business of the Defendant, and at her special instance and request, &c.

To action on an attorney's bill, Defendant pleaded that the bill was for work at law and in equity, and was not delivered to her a month before action. Replication, that the bill was not for work at law and in equity: Held, ill.

Plea, That this action was brought by the Plaintiff against the Defendant, to recover from her the amount of a bill of fees for the work and labour of the Plaintiff, by him bestowed as the attorney and solicitor of and for her, the Defendant, at law and in equity: and that the Plaintiff commenced this action against the Defendant for the recovery of such bill of fees, before the expiration of one month after the delivery of his said bill of fees to the Defendant (she being the party to be charged therewith), contrary to the form of the statute in such case made and provided: and that, the Defendant was ready to verify, &c.

Replication, That this action was not brought by the Plaintiff against the Defendant, to recover from her the amount of a bill of fees for the work and labour of the Plaintiff, by him bestowed as the attorney and solicitor of and for the Defendant, at law and in equity, in manner and form as the Defendant had above in her plea in that behalf alleged: and that, the Plaintiff prayed might be enquired of by the country, &c.

Demurrer, for the following causes:—That the Plaintiff had alleged that this action was not brought by him against the Defendant for the amount of a bill of fees for the work and labour of the Plaintiff, by him

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bestowed as the attorney and solicitor of and for the Defendant, at law *and* in equity; whereas the Plaintiff ought to have alleged that the action was not brought against the Defendant for the amount of a bill of fees for the work and labour of the Plaintiff, by him bestowed as the attorney and solicitor of and for the Defendant, at law *or* in equity: also, that the replication tended to raise an immaterial issue; inasmuch as if the Defendant should join issue thereupon, and should on the trial prove that the bill of fees contained charges for fees at law, though not for any fees, charges, or disbursements in equity, such issue must be found for the Plaintiff, although it would be manifest the Plaintiff had not complied with the statute, and therefore would have no right to maintain his action.

Whitmore, in support of the demurrer, referred to *Goram v. Sweeting* (a), and to the several authorities cited in the note to that case. The rule as to traverses is, that where the Plaintiff's claim is founded on title to land, and he sets out in the declaration a title larger than he possesses, the Defendant may take advantage of it by traversing the entire allegation. But in actions for damages, where the Plaintiff is entitled to recover, although his proof should not substantiate the whole of his demand, a traverse which seeks to bind him to the proof of his entire demand, is immaterial and bad.

A Beckett contra. If the Plaintiff had traversed the plea in the disjunctive, his replication would have been ill for duplicity; and the most correct way of negating any allegation of the opponent, is to follow precisely the terms of the allegation. It is the Defendant's fault if her allegation be laid too widely; for she had the Plaintiff's

(a) 2 Wms. Saund. 206.

bills before her; and if they contain charges in law only, she should have declared according to the fact which was within her own knowledge. In *Wood v. Budden* (a), where, to trespass in plaintiff's close, defendant pleaded a right of chace as well over that close as over the whole parish, which the plaintiff traversed by denying the right as well over the close as the parish, and the jury found he had not such right over the close *and* parish, the traverse was held good upon motion in arrest of judgment, although the Defendant would have been entitled to a verdict if he had the right over the Plaintiff's close only.

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TINDAL C. J. The replication is a bad answer to the plea, and bad, for the cause assigned in the demurrer.

The stat. 2 G. 2. c. 23. provides that no attorney or solicitor shall commence any suit for the recovery of fees, charges, or disbursements at law or in equity, until a month after the delivery of his bill to the party to be charged.

The Defendant pleads that the action was brought for charges at law and in equity, and that no bill has been delivered pursuant to the statute: and this would be an answer to the action if the claim were for charges either at law or in equity.

If the Plaintiff's claim was not open to the objection arising under the statute, he could have answered the plea by denying the existence of charges at law or in equity. But it is not because the Defendant may have unnecessarily specified both, that the Plaintiff is exonerated from taking a material issue. In the case in *Hobart* the objection was not taken till after verdict.

GASKLEE J. The proper replication would have been, in effect, that the bill was not taxable, whereas the Plaintiff only says it was not taxable at law *and* in equity.

VAUGHAN and BOSANQUET Js. concurred.

Judgment for Defendant.

(a) *Hob.* 119.

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Nov. 22. THOMPSON v. BRADBURY and Another, Assignees
of VENABLES, a Bankrupt.

The Court allowed the assignees of a bankrupt to plead, in covenant on a lease,

1st, that the lessee's interest did not pass to them ;

2dly, that they renounced the term in time to be discharged from the performance of covenants.

TO covenant by lessor against the assignees of lessee,

Hoggins obtained a rule *nisi* to plead, first, that all the lessees' estate and interest, &c. in the premises, did not pass to the Defendants ;

Secondly, that a term in the premises was vested in *Venables*, who became a bankrupt ; that the Defendants were appointed his assignees, concurrently with the official assignee, who afterwards abandoned all claim to the premises, and therefore, Defendants never became assignees of the term, and the term did not so vest in them as to render them chargeable with the performance of covenants.

Amos, who shewed cause, contended that the second plea was superfluous, for all the allegations contained in it might be given in evidence under the first. But *Hoggins* urged, that under the stat. 1 & 2 W. 4. c. 56. s. 26. it might be doubtful, whether or not the term passed to the assignees without their actually taking possession ; and in case the Court should hold that at all events the legal interest passed upon the issuing the commission of bankruptcy, the Defendants ought to have the opportunity of shewing, under the second plea, that they had renounced the property before taking such a possession as should fix them with the performance of covenants.

And of that opinion was the Court. But they required that the second plea should be confined to the single point, that the Defendants had renounced or abandoned the term in time to be discharged from

liability on covenants; and ordered the allegation that it had never vested in them to be struck out. That allegation, if correct, might be proved under the first plea.

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THOMPSON
v.
BRADBURY.

WATSON and Another, Assignees of DEVEY, a Bankrupt, v. PEACHE. Nov. 22.

TROVER for eleven barges, which were in the possession of *Devey* at the time of his bankruptcy in October 1833.

Devey was a coal-merchant, and a freeman of the Watermen's Company; the Defendant, an owner of barges, which he let out to hire, and not a member of the Watermen's Company: and the barges in question, which belonged to the Defendant, had been hired of him by *Devey* in 1829, and previously.

Two of them, the *Francis* and the *Oak*, had originally belonged to *Devey*; but he, being in debt, sold them to, and then took them from the Defendant on hire, by one and the same instrument, in May 1829. This transfer was only known to the Defendant's clerks. Nine of the barges had *Devey's* name and number painted on them; and two, the name and number of the Defendant or his son. The *Francis* and *Oak* had *Devey's* name before the sale, and continued in exactly the same state after the hiring. With the exception of two—the *Rose* and *Pink*—all were registered in *Devey's* name at the office of the Watermen's Company; where it was the general practice to register only the name of the

A coal-merchant, at the time of his bankruptcy, had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act. These barges he had hired of Defendant, it being the custom for coal-merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal-

merchant's assignees under his bankruptcy, Held, that it was properly left to the jury to find whether the custom to hire was generally notorious in the coal trade; and that it was not necessary to direct them to enquire whether the custom was notorious to the world at large.

J. S. R. Ex. 102.

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J. — Op. 253.

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true owner, although, in some few instances, the name of a lessee had been substituted.

The *Rose* and *Pink* were not registered.

Devey had once hired two barges of one *Griffith*, and had navigated them, with *Griffith's* name and number painted thereon, for five or six years: he had also been in the habit of hiring barges for a short time, with the Defendant's name and number on them.

The statute 7 & 8 G. 4. c. 75. s. 39. requires the Watermen's Company, upon the request of any person who shall "*keep any barge*," to cause the name and place of abode of "*such person*" to be registered in a book of the Watermen's Company, and to cause a number for such barge to be delivered to "*such owner*," who shall cause the same, together with the name of such barge, to be painted on the barge. Penalty for omission 40s. Sect. 101. Nothing in the act, except the provision for compelling the name of the barge and "*of the owner*" to be painted thereon, to apply to western barges. Sect. 56. The Watermen's Company to make by-laws. Sect. 37. Any person not a freeman of the company, acting as a lighterman, to pay for each offence 10*l*.

By a by-law of that company, of *April* 1828, No. 1., the *owner* is required to have his name painted on the barge; and the penalty for omission is increased to 5*l*. By No. 10., if any freeman of the company navigate any barge without his own name or that of his master thereon, he shall forfeit 40s. By No. 20., if any freeman of the company, who hires a barge of any person not free of the company, and has his own name thereon, permits such person to participate in the profits, or shall permit any owner not being free of the company to have his name thereon, such freeman shall forfeit 40s.

The Defendant called eighteen witnesses, chiefly coal-merchants, barge-builders, and lightermen; who proved

that, for the last twelve years, a custom had existed for persons in the coal trade to hire barges and waggon, and when they hired them for any length of time to have their own names and number painted on them.

It was stated that, when the vessels were hired for a short time only, as for a week or fortnight, it was usual to leave on them the name of the owner.

Tindal C. J., after observing that the Plaintiffs had made out a strong *prima facie* case, left it to the jury to determine whether the alleged custom was so general and notorious in the trade which the bankrupt carried on, that those who had dealings with him—the world in which he moved—might reasonably be provoked to inquire, before giving the bankrupt credit, whether the barges were his or not; and if they thought the custom so notorious, to find for the Defendant.

The jury having found for the Defendant,

Wilde Serjt. obtained a rule *nisi* for a new trial, on the ground that the verdict was against the weight of evidence, and that it ought to have been left to the jury, whether the alleged custom was notorious to the world at large, and not merely to the trade in which the bankrupt was engaged.

Coleridge Serjt., *Thesiger*, and *Channell* shewed cause. The question was correctly left to the jury, and correctly determined, according to the principle established by *Storer v. Hunter* (a), where, with respect to the machinery of a colliery, *Abbott* C. J. said, “ It appears by the evidence, that in some instances the articles used in collieries belong to the tenants, in others they do not; that, though in some cases, the landlord, in demising collieries, permits the lessee on certain conditions to

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have the use of the fixtures and other things during the demise, yet, in other instances, they belong absolutely to the lessee. Then, if the possession of such things is consistent with the fact of a person being absolute owner, and also of his not being absolute owner, the mere possession of such things ought not to raise an inference in the mind of any cautious person acquainted with the usage, that the person in possession is the owner. If it had not been the usage for the owners of collieries ever to demise the machinery and other things used in the colliery, then possession by the lessee would be evidence of reputed ownership; and no evidence having been adduced to shew that the bankrupt ever had the absolute ownership in the articles used in these collieries, I am of opinion that the jury ought, upon these facts, to have given a verdict for the defendant."

In *Horn v. Baker* (a), upon a question as to the reputed ownership of a distiller's vats, Lord *Ellenborough* said, "If, as in some manufactories, where the engines necessary for carrying on the business are known to be let out to the several manufacturers employed upon them, there had been a known usage in the trade for distillers to rent or hire the vats and other articles used by them for the purpose of distilling, the possession and use of such articles would not, in such a case, have carried the reputed ownership." *Gurr v. Rutton* (b), *Muller v. Moss* (c), and *Clark v. Crownshaw* (d), are to the same effect. It was for the Plaintiffs to make out affirmatively that *Devey* was the reputed owner of the barges within the meaning of the seventy-second section of 6 G. 4. c. 16. But he was not reputed owner by those who dealt with him and had the best means of knowing his situation; and if so, it is immaterial what was the

(a) 9 East, 239.

(b) Holt N. P. C. 327.

(c) 1 M. & Sel. 335.

(d) 3 B. & Adol. 804.

opinion of the rest of the world. Those who deal with him were no more liable to be imposed upon by his possession of the barges, than the customers of a factor by the appearance of goods which he holds on consignment. The Defendant, not belonging to the Watermen's Company, could not legally put his name on the barges: and the only object of requiring any name to be inscribed, was, that some person might be responsible for damage done on the river.

In *Thackthwaite v. Cock (a)*, the plaintiff's hops, of which the bankrupt was held to be the reputed owner, were mixed up with the bankrupt's hops, for the purpose of deceiving the public; and though that appeared to be the custom, such a custom is illegal. In *Knowles v. Horsfall (b)*, no usage was stated or relied upon.

Talfourd Serjt. and Swann in support of the rule. This custom is contrary to 7 & 8 G. 4. c. 75., and therefore illegal; for the barges ought to be registered in the name of the true owner, and ought to bear his name and number. And the testimony for the Defendant consisting chiefly of persons interested in supporting such a custom, the verdict is not warranted by the evidence. But supposing such a custom legal if it were well established, here it has only been proved to be known to the trade; which is not sufficient; *Hickenbotham v. Groves (c)*: it ought to be known to the world at large; for a trader accepts bills of exchange, which circulate beyond the limits of his trade. In *Thackthwaite v. Cock (d)*, *Mansfield C.J.* says, "It must be such a custom, that persons dealing with the traders may see and know that the goods may possibly not be the property of the possessor." In *Knowles v. Horsfall (e)*, — where brandies had been

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(a) 3 Taunt. 487.

(d) 3 Taunt. 491.

(b) 5 B. & Ald. 134.

(e) 5 B. & Ald. 139.

(c) 2 Carr. & P. 492.

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sold to the plaintiff by *Dixon*, of whom the defendants were assignees, and the casks had been marked with the letter K., the initial of the plaintiff's name, but remained in *Dixon's* possession, — it was notorious to the trade that the brandies had been sold ; but *Abbott C. J.* says, “ the letter K. marked on the casks might speak a language to a certain class of persons intelligible, but to others, who might be induced to become the creditors of *Dixon* in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that he would have had a good title to them as against the plaintiff. For the real owner ought not to have left the goods after the purchase in the hands of *Dixon*, and suffered him to treat them as his own.” *Bayley J.* says, “ It was necessary that something should be done to make the change of property notorious to the public at large, or at least to those persons who were likely to trust the bankrupt upon the faith of his having the property in these goods. It is not sufficient that it should be known only to persons in the same trade.” And *Best J.* says, “ It is not sufficient that the sale was known to persons in the wine trade at *Liverpool*. The transfer of the property ought to have been known to all other persons who might, in consequence of the bankrupt's continued possession of it, have been induced to give him credit.”

And such a custom as the Defendant relies on has never been sanctioned, except in cases where the possession has been of so equivocal a description as to be consistent with either supposition ; that the trader was absolute owner, or was not ; it has never been allowed to prevail where the property, as in the present case, has been registered in the bankrupt's name and inscribed with his name and number. No creditor would be safe, if such unequivocal indications of ownership

were insufficient to justify him in giving credit. [*Tindal* C. J. A hired carriage is often adorned with the arms of the party hiring; yet few would infer from that circumstance, that the vehicle was his.] At all events, with regard to the *Francis* and *Oak*, they were originally the bankrupt's property; the transfer to the Defendant was never made public, and therefore the reputed ownership in *Devey* has been clearly established. In *Lingard v. Messiter* (a), which was an action by the assignees of a bankrupt, brought to recover property in the bankrupt's possession as reputed owner, the plaintiffs proved that the bankrupt had once been the real owner of the goods in question, and that he continued in possession of them until he committed an act of bankruptcy; and it was held, that that was *prima facie* evidence that he continued in possession as owner, and that it then lay upon the defendant to prove that the bankrupt had ceased to be the reputed owner. The defendant proved that, long before the act of bankruptcy, the goods had been seized under an execution, at the suit of a creditor, by the sheriff; that they were conveyed by a bill of sale to the creditor; and that he afterwards demised them at an annual rent to the bankrupt, who continued in possession of them till the time of his bankruptcy: soon after the bill of sale was executed, the creditor's initials were marked on all the goods; and it was held, that that was no evidence of the notoriety of the change of property; and, consequently, that there was no evidence to go to the jury that the bankrupt had ever ceased to be the reputed owner. In *Newport v. Hollings* (b) it was held that an innkeeper, by never putting his name on vehicles, gave out, in effect, that they were not his own. The converse of that proposition holds good in the present case.

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(a) 1 B. & C. 308.

(b) 3 Carr. & P. 223.

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TINDAL C. J. The question in this cause arises on the seventy-second section of the last bankrupt act, 6 G. 4. c. 16., by which it is enacted, "That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission." The words of the act are, "whereof he was reputed owner;" and the question is, whether on the trial of this cause such a reputed ownership was properly established. The jury have found by their verdict that it was not.

Two objections have been made made to that verdict. First, that the mode in which the question was left to the jury was not correct; secondly, that the verdict was contrary to the evidence.

Now there was evidence on both sides. The Plaintiffs made out a strong *prima facie* case of reputed ownership in the bankrupt; but on the other side, evidence was adduced to shew that there prevailed in the coal trade a usage, well known in the neighbourhood in which the bankrupt resided, for coal merchants to carry on their business in hired barges, bearing the name of the hirer.

There was, therefore, a balance of testimony to be left to the jury, and it would put an end to the use of juries, if, upon a balance of testimony, their finding were to be set aside. If, upon evidence thus conflicting, we were to send the cause down to trial again, and a second jury were to find a contrary verdict, are we to send the cause down to a third trial, and so on *ad infinitum*?

We come then to the other point, whether the question was properly left to the jury.

I left it to the jury to say, whether in the coal trade in *London*, there was any general custom for merchants to carry on their business in hired barges, bearing the name of the hirer: I said, that to warrant a verdict for the Defendant, the custom must be so general as that all should know it who had dealings or were likely to have dealings with the bankrupt.

It is objected that this direction was too limited, and that, in order to warrant a verdict for the Defendant, the jury should have been required to determine whether the custom was notorious to the whole world, or whether, in the language of the seventy-second section of 6 G. 4. c. 16., the bankrupt was the reputed owner of the barges of which he had the disposition.

Now it *would* have been leaving the question in too limited a way, if the jury had simply been directed to consider whether the bankrupt was the reputed owner of the goods; a question, which, by itself, they could not be expected easily to deal with; and in all the cases the jury have been directed to consider whether the usage set up in answer to a *prima facie* case of reputed ownership, has been a general usage, and known to those who have dealings with the bankrupt. Whether the bankrupt be the reputed owner of property, or not, can only be known by looking to the acts of the trader, his contracts, and his dealings in his trade, — in the world in which he moves.

When the jury are satisfied that the usage relied on is notorious to all who are likely to have any dealings with the bankrupt, there is sufficient to warrant their verdict and the question which they were directed to consider.

Two cases have been relied on for the Plaintiffs. First, *Thackthwaite v. Cock*: there the plaintiff, in 1808, purchased seventy-eight pockets of hops, the goods in question, of *Moore*, who was a hop-merchant, and paid

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for them, and agreed with him that the hops should remain in *Moore's* warehouses at the rent of a penny a pocket per week, until the plaintiff should think it advantageous to resell them. In 1810 *Moore* became a bankrupt, and his assignees, finding those goods on the premises, refused to deliver them to the plaintiff. The plaintiff endeavoured to take the case out of the statute of 21 *Jac.* 1., by proving a custom of the trade for purchasers of hops to permit their hops to remain upon rent in the hop-merchant's warehouses. The hops were exposed to the view of persons coming into the warehouse to purchase, promiscuously with the other goods of the bankrupt: they were not distinguished by any conspicuous mark from *Moore's* goods, because any thing that would draw attention to the length of time they had been on sale, would hurt the sale of them. It is clear, therefore, that, as far as the eye of the public went, there was no distinction between the goods of the bankrupt and the residue. The whole mass was calculated to give a false credit; and it was held that this was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees in case of bankruptcy, as being in his possession, order, and disposition, within the statute of 21 *Jac.* 1. c. 19. s. 11.

But there is a great distinction between that case and the present: the one relates to the bankrupt's stock in trade, the different portions of which were not distinguishable by the public; the other concerns only the implements with which the bankrupt carried on his trade, and which, according to a usage notorious in the trade, were frequently hired by the trader. In *Thackthwaite v. Cock*, indeed, a usage was relied on, but the learned Judge said it was not clearly proved; while it was a usage calculated to deceive the public, and therefore bad.

In *Knowles v. Horsfall* no general custom was set up, and the only question was, whether the bankrupt was to be reputed owner under the circumstances of the particular case. There *Dixon*, a spirit-merchant, sold to the plaintiff, a wine-merchant, several casks of brandy, some of which, at the time of the sale, were in *Dixon's* own vaults, and others in the vaults of a regular warehouse-keeper. It was agreed between the parties, that the brandies should remain where they were until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade at the place where the parties resided, that the sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited.

It was there contended, that as it was notorious to the trade that plaintiff had purchased the brandies in question, there could be no reputed ownership in *Dixon*. But it was held, that as *Dixon* became bankrupt while the brandies remained where they were originally deposited, the whole of them passed to the assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1. c. 19. s. 11. It was impossible to say, that though to some extent the defendant might have taken possession, that circumstance was not, upon the whole, overbalanced by the conflicting evidence of reputed ownership in the bankrupt.

The present case, therefore, has been left to the jury in the same way as those which have preceded it, and there is no ground for disturbing the verdict.

GASELÉE J. I am of the same opinion. In *Knowles v. Horsfall* no usage was relied on, and it could not be

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said that the transfer of the article was notorious, when the warehouse-keeper himself did not know the fact.

I think the present case was left to the jury correctly; and, if a juror, I should have concurred in the verdict which has been given. At all events, I cannot say it was wrong.

VAUGHAN J. I am of the same opinion. The question was properly left to the jury, and the jury have come to a proper conclusion.

The possession of the bankrupt raised a strong *prima facie* case of reputed ownership; but whether there was such a usage in the trade, as to do away with the effect of the apparent ownership, was a question of fact for the jury: they have found that the usage was notorious; and, upon the principles laid down in *Storer v. Hunter*, I think this rule must be discharged.

BOSANQUET J. The only question is, whether the verdict of this jury has proceeded on too narrow a ground, either in consequence of the observations of the Chief Justice, or from the nature of the evidence.

The jury were not wrong, in finding on the two questions left to them, the existence of the usage, and its notoriety in the trade.

The bankrupt carried on the business of a coal merchant; the barges he used, were hired of the Defendant; and the question is, whether there was such a reputed ownership in the bankrupt, as to pass the property in the barges to his assignees. Now it is material to consider what is the nature of the articles in respect of which the assignees seek to recover in this action. They are not goods for sale; not the premises in which the bankrupt carried on his business; but are implements of trade; and the evidence is, that it is usual

for persons engaged in this trade to hire their barges, and when they hire them for any length of time, to paint on them the name of the hirer: this appears to be a police regulation, required by the statute 7 & 8 G. 4. c. 75., that in case of damage some person may be forthcoming to answer for it: but it is contended, that though the usage might be known in the particular trade, it might be unknown to creditors of the bankrupt unconnected with that trade.

Still, however, the question is, whether under such circumstances the bankrupt is generally reputed the owner.

Now, if it be known in the trade that such a usage prevails, at least there is no reputed ownership within the sphere of the trade: that is, among the persons with whom the bankrupt constantly deals: if not with them, it is no answer to say that persons unconnected with the trade, who may have advanced money to the bankrupt, were ignorant of the usage. That would be going a long way; for every trader has creditors beyond the sphere of the trade in which he is engaged. But the question has always been, whether articles hired under such a custom have been reputed to belong to the bankrupt. According to the evidence in this case, they have been as frequently reputed to belong to the lessor as to the bankrupt: upon that ground, therefore, I think the verdict is well founded.

In *Knowles v. Horsfall*, *Hickenbotham v. Groves*, and *Lingard v. Messiter*, no usage was proved. *Thackwaite v. Cock*, it is said, however, is more applicable, because there a usage existed. But what sort of a usage was it? a custom of the trade for purchasers of hops to permit their hops to remain upon rent in the hop-merchant's warehouses. The hops were exposed to the view of persons coming into the warehouse to purchase, promiscuously with the other goods of the

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bankrupt; they were not distinguished by any conspicuous mark from the bankrupt's goods, because any thing that would draw attention to the length of time they had been on sale, would hurt the sale of them. If the custom had been good in other respects, at least it was in the teeth of the statute, for the goods in question were articles of merchandize, and after a transfer remained apparently as part of the stock of the vendor: the object of the custom, however, was to deceive the public, and therefore the custom was bad.

It has been urged in the present case, that one or two of the barges *had* been the property of the bankrupt, which distinguishes the case from *Storer v. Hunter*, and brings it within the principle of *Lingard v. Messiter*. That case, however, shews that such a circumstance is only *primâ facie* evidence of reputed ownership; as are the circumstances of possession, and the inscription of the bankrupt's name; but, like every *primâ facie* case, it is open to an answer.

When, therefore, a usage is proved, from which it appears that the barges with which a coal merchant carries on his trade are not necessarily his, how is that answered by shewing that one or two among those which he has hired were originally his own property? It only makes the *primâ facie* case stronger: but, the notoriety of the custom having been established by the jury, the rule for setting aside the verdict must be

Discharged.

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MOSTYN and Others v. CHAMPNEYS and Others. Dec. 20.

BY order of the Lord Chancellor, the following case was submitted for the opinion of this Court:—

Sir *Thomas Mostyn* Bart. was, at the time of making his will, and of his death, seised in fee simple of, and absolutely entitled in possession to, divers manors and lands in the county of *Chester*, and in the county of the city of *Chester*; and also of large estates in the counties of *Flint*, *Denbigh*, *Carnarvon*, and *Anglesea*: and being so seised and entitled, by his last will and testament in writing, duly executed and attested, in *May* 1752, gave and devised the estates in *Wales* to his son *Roger* in tail male; remainder to his son *Thomas* in tail male; remainder to all and every other the son and sons of testator's body in tail male, severally and successively one after another, according to the seniority of age of each of them; remainder to testator's brothers *John*, *Savage*, and *Roger*, severally and successively in tail male; remainder to testator's own right heirs. And the testator thereby gave and devised his several manors, lands, tenements, and hereditaments in the county of *Chester*, and in the county of the city of *Chester*, unto the person or persons who should be entitled to the inheritance of his lands in *Wales* after his decease, by virtue of the limitations thereof aforesaid in his said will contained.

Sir *Thomas Mostyn* died in the year 1758, without having revoked or altered his will; and upon his death, the premises in the county of *Chester* and in the county of the city of *Chester*, did under and by virtue of his will, become vested in *Roger Mostyn* (who then became Sir *Roger Mostyn* Bart.), the eldest son and heir-at-law

Testator being seised in tail of lands at *C.*, with remainder to his son in tail, and reversion to himself in fee, and being seised in fee of other lands at *D.*, devised "all his real estates whatsoever, over which he had any disposing power," to *R.* and his heirs, in trust for testator's son for life, with several remainders over in tail, subject to terms for the payment of debts, annuities, and marriage portions: Held, that by this devise testator's reversionary interest in the lands at *C.* passed to the devisee.

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of the testator, as tenant in tail male thereof, with such remainders over as in the same will mentioned, with the ultimate reversion in fee in him the said Sir Roger *Mostyn* as heir-at-law of Sir *Thomas Mostyn*.

Sir *Roger*, besides the estates in the county of *Chester* and in the county of the city of *Chester*, of which he was tenant in tail male as aforesaid, was seised of and well entitled in possession to divers other estates and hereditaments in the counties of *Denbigh*, *Flint*, and *Carnarvon*, part whereof were settled by him in or about the year 1766, on the occasion of his marriage; but he never suffered any recovery, or made any other assurance for barring the estate in tail male, or the remainders over, in the estates in the county of *Chester* and county of the city of *Chester*, but continued in possession or in receipt of the rents and profits thereof, as tenant in tail male, up to the time of his decease in 1796. He also in his life time, and after his marriage in the year 1766, purchased divers other real estates in the county of *Flint*, and continued to be, at the time of making his will, and at his death, seised in fee simple of or otherwise well entitled to the real estates so purchased by him.

Sir *Roger*, by his last will and testament in writing, duly executed and attested, in *April* 1793, gave and devised as follows: — To each of his unmarried daughters who should attain twenty-one, from that age until marriage, “such an annuity, as with the interest of their share of 20,000*l.*, provided for their portions by his marriage settlement, would, at 4 per cent., furnish them severally with 500*l.* a year.”

Upon their respective marriages, he directed “their annuities to cease, and in lieu thereof, that each daughter marrying shall be entitled to such sum as, with her share of the said 20,000*l.*, would make up 10,000*l.*”

Then he devised “all his real estates, whatsoever and wheresoever, over which he had any disposing power,” unto

Hugh Scott, his heirs, &c., to the uses and upon the trusts, &c. therein-after expressed concerning the same; that is to say,

To the use of the Duke of *Roxburgh*, and others, for 500 years, upon trust to pay out of the rents and profits such debts and annuities as the testator's personalty should be insufficient to discharge: and subject to the said term and the trusts thereof,

To the use of his son, *Thomas Mostyn*, for life, remainder to a trustee to preserve, &c.; remainder to the use of the said *T. M.*'s first and other sons in tail male; remainder to the use of the daughters of the said *T. M.* in tail male; remainder to the use of the sons and daughters of the said *T. M.* in tail general; remainder to the said trustees for 1000 years, upon certain trusts; remainder to the use of testator's daughter, *Essex Mostyn*, for life; remainder to a trustee to preserve, &c.; remainder to her sons in tail male; remainder to testator's daughter, *Charlotte Champneys*, and her sons, in like manner; remainder to testator's daughter, *Elizabeth Mostyn*, and her sons, in like manner; remainder to testator's own right heirs. The testator then declared, that the 1000 years term was limited to the trustees upon trust, that when and as soon as his estates should come into possession of any of his daughters, or her issue male, the said trustees should, by sale or mortgage of a competent part of the estates comprised in the said term, raise and pay to each other of his said daughters who should happen to be then living the sum of 10,000*l.*, and in case any of his daughters should be dead, leaving any child, &c., the like sum for such child.

The testator, Sir *Roger*, died in the year 1796 without having altered or revoked his will, leaving *Thomas Mostyn*, his only son and heir-at-law, surviving, who thereupon became Sir *Thomas Mostyn Bart.* And he,

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Sir Thomas Mostyn the younger, upon the death of the testator *Sir Roger*, his father, became seised of and entitled to the said manors, estates, hereditaments, and premises in the said county of *Chester*, and in the county of the city of *Chester*, as tenant in tail male thereof in possession, under and by virtue of the devise thereof in the will of his grandfather, *Sir Thomas Mostyn* the elder, and subject to the remainders over in tail thereby limited.

Sir Roger was, at the date of his will, and at the time of his death, in the receipt of the rents and profits of the estates in the county of *Chester* and county of the city of *Chester* in question in this cause, amounting annually to the sum of 5000*l.* or thereabouts; and was also in possession and in receipt of the rents and profits of estates in the counties of *Flint* and *Carnarvon*, over which he had a disposing power, amounting to the annual sum of 2750*l.* or thereabouts.

At the time of the death of *Sir Roger*, the several persons to whom estates in tail male in remainder in the said manors, estates, hereditaments, and premises in the said county of *Chester* and county of the city of *Chester* were devised by the will of *Sir Thomas Mostyn*, the elder, were respectively dead, without ever having had any children, except *Thomas Mostyn*, his son named in his will, who was then the *Rev. Thomas Mostyn*; and *Sir Thomas Mostyn* the elder had no sons except *Sir Roger* and the *Rev. Thomas Mostyn*: the *Rev. Thomas Mostyn*, therefore, at the time of the death of *Sir Roger*, was the only person alive entitled to any estate tail in remainder, or other estate in remainder, in the said manors, estates, hereditaments, and premises in the county of *Chester* and county of the city of *Chester*, under the will of *Sir Thomas Mostyn* the elder.

The *Rev. Thomas Mostyn* died in the year 1805, without ever having had issue.

Sir *Thomas Mostyn* the younger died in the year 1831, without having had issue, or having suffered any common recovery, or made or effected any assurance by which his estate in tail male, or the remainders limited by the will of Sir *Thomas Mostyn* the elder, in the manors, estates, hereditaments, and premises in the county of *Chester*, and county of the city of *Chester*, were in any manner barred or destroyed.

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The Plaintiffs alleged that the reversion in fee of the estates in the county of *Chester* and the county of the city of *Chester*, upon the death of Sir *Roger*, vested in Sir *Thomas Mostyn* the younger, who was from that time, and up to the time of his death, under the will of Sir *Thomas Mostyn* the elder, seised in tail male in possession, with (as the Plaintiffs alleged) the immediate reversion in fee simple in himself.

Essex Mostyn, one of the devisees mentioned in the will of Sir *Roger*, died on the 20th of *May* 1829, without issue.

Upon the death of Sir *Thomas Mostyn* the younger without issue, Dame *Charlotte Champneys*, one of the Defendants, became seised or entitled under the limitations contained in the will of Sir *Roger*, of or to the estates and hereditaments thereby devised, as tenant for life thereof; and she claimed to be entitled, as such devisee, not only to the estates of which Sir *Roger* was seised in fee-simple in possession at the time of making his will; but also to the manors, estates, hereditaments, and premises in the county of *Chester* and the county of the city of *Chester*, of which the testator was tenant in tail, with such remainders over in tail as aforesaid, with the reversion to himself in fee; she asserting that the said reversion in fee passed by the will of Sir *Roger*, and was subject to the limitations thereby made.

The question for the opinion of the Court was, whether the reversion in fee of the said manors, estates,

1834. hereditaments, and premises in the county of *Chester* and county of the city of *Chester*, passed by the will of Sir *Roger Mostyn*, or descended upon his death on his son Sir *Thomas Mostyn* the younger.

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Hodgson for the Plaintiffs. The reversion in fee of the county and city of *Chester* estates did not pass by the will of Sir *Roger Mostyn*.

First, he devises only the estates over which he has "any disposing power;" that is, any power of disposing by that instrument: now, as he *might*, by suffering a recovery, have acquired such a power of disposition, but omitted to pursue that course, it cannot be supposed he intended them to pass under these words. It is to be inferred from the case that he had, in fact, suffered recoveries of the *Welsh* estates; and, therefore, he must have been aware of the distinction between the two properties, and the steps necessary to be taken in order to acquire the power of disposing of the *Chester* estates. In 2 *Ves. & Bea.* 199., in reference to a similar case, Sir *W. Grant* says, "With all the anxiety which the will manifests to keep the estate in the family as long as possible, by making his son and grandson tenants for life, it is inconceivable that he should not have acquired to himself the power of making those limitations effectual, if he knew that, as things stood, they would be wholly inoperative."

Secondly, general words in a will do not pass a reversionary interest where the will contains dispositions incompatible with an intention that such reversionary interest should pass. In *Goodtitle dem. Daniel v. Miles* (a), the testator—who was possessed in fee of lands at *Kewson*, &c. and of other lands settled on himself and his wife for life with remainder to the heirs of their bodies and reversion to himself in fee,—devised to one

(a) 6 *East*, 494.

of two daughters, his only children, and the heirs of her body, subject to an annuity to her sister, his lands at *Kewson*, &c. and all other lands, whatsoever and wheresoever, which he should be possessed of, or in anywise entitled to, at the time of his decease, and which were not settled in jointure on his late wife: it did not appear he had any other property than the settled lands, and the lands at *Kewson*, &c. And upon a question, whether, under this devise, the reversion of the lands settled in jointure passed to the devisee, Lord *Ellenborough*, upon a review of all the previous cases, says, "Under these circumstances the deviser had no interest which could be the object of any disposition to be made by him, but subject to the remainder in tail general in his daughters; nor had he any thing upon which his will could operate in the limitation of any estate in possession until both the daughters should be dead without issue; and, therefore, if the testator's object was, as according to the provisions of the will it must have been, to limit estates which were to take effect during his daughters' lives, it is impossible to suppose the testator could mean that his will should extend to lands, in respect of which he must have known that it could not operate to create the estates intended." — "One of the grounds taken by Lord *Mansfield*, for restraining the general words of a will to a distinct class of lands, in the case of *Strong v. Teatt* (a), was the absurdity that would follow from giving it its utmost latitude of construction. This argument appears to us so conclusive on the question, as to make it unnecessary to consider what weight is due to the other arguments on the part of the defendant." — "Our opinion goes on this, that, supposing the words 'not settled in jointure on my wife,' to be insufficient of themselves to restrain the effect of the general words in the clause relied on by

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(a) 2 Burr. 912.

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the plaintiff, yet, taking with them, at the same time, into our consideration the limitations in the settlement and in the will, they must, we think, be understood as being restrictive; and the question in this case is, as in most other cases on wills, a question of intention, to be collected from the whole of the instrument, as applied to the subject matter."

Another difficulty was stated in *Welby v. Welby* (a), where Sir *William Grant* intimated, that if a court of law should hold the property to pass under general words, where the will contained limitations incompatible with an intention to pass the reversion, the question must arise whether the devisee would not be put to his election in a court of equity; and therefore, for a court of law to hold that under such circumstances the reversion passed, would be to hold that the intention was to pass an estate in possession, which would be manifestly absurd.

Now, in the present case, the primary object of the testator, the first disposition in his will, is for the payment of debts, and of annuities to his daughters. For this purpose he creates a term, and appoints trustees, who are to make the payments immediately out of rents and profits, or by sale or mortgage. The testator could never have intended to apply to this purpose a reversion which did not come into possession till thirty-five years after his death, and of which, during all that time, the devisees might at any moment have been deprived, by the tenant in tail, or his successors, suffering a recovery. And that distinguishes the present case from *Glover v. Spendlove* (b), where, as the testator had no son, he had for all purposes of substantial benefit the fee expectant on his wife's life estate.

Preston contra. The reversion in fee of the county and city of *Chester* estates passed by this devise.

(a) 2 *V. & B.* 194.(b) 4 *Bro. Ch. Ca.* 337.

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General words in a will must receive the largest interpretation, unless they are restrained by express exception, or by dispositions in the will *clearly and absolutely* incompatible with the testator's apparent intention to pass all that he has. *Welby v. Welby* and *Roe dem. James v. Avis (a)*, on the authority of which Sir William Grant proceeded in *Welby v. Welby*, were both over-ruled by Lord Eldon in *Church v. Mundy (b)*; and the polar star upon subjects of this sort is the case of *Strong v. Teatt (c)*: there, the testator being entitled to the reversion of estates settled on himself for life, with remainder to his son *Henry* for life, remainder to issue of *Henry* successively in tail, and being possessed of other lands in fee, after disposing of the latter, devised all other the lands and hereditaments whereof he was seised in fee, or any other person was seised in trust for him, (subject to an annuity for his wife, and a power of sale to discharge debts,) to his son *Audley* for life, with remainder to his issue in tail; remainder to testator's sons *James*, *Theophilus*, and *Henry*, severally and successively for life, with like successive remainders to their several issue in tail; with several remainders over: if *Henry* and *Audley* died without issue male in the lifetime of *James*, the lands and tenements devised to *James* were to go over to *Theophilus*: the executrix was to have power to incumber the lands with portions for daughters; and the testator's sons in succession were to have power to commit waste, and to settle jointures. And Lord Mansfield said, "The generality of the expressions, if unrestrained and unqualified by other words, would carry all the testator's estate in possession, reversion, or remainder. But these general words may, by other words and expressions in the will, be restrained to any or either of these; and it is the same thing whether it be directly expressed, or *clearly and plainly* to be collected from the

(a) 4 T. R. 607.

(b) 15 Ves. 406.

(c) 2 Burr. 912.

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will. Now, here are plain expressions in this will, which are fully sufficient to shew, that the testator did *not* intend to devise the reversion of this settled estate. One instance is, the clause ‘that if *Henry* and *Audley* should both of them die without issue male in the lifetime of *James*, then *James* should not take any interest or estate in the lands and tenements therein-before devised to him, but that the same should remain and go over to *Theophilus*.’” He then adverts to the powers to charge and jointure; and adds, “But these minute and critical observations serve only to weaken the argument, since there are in this will sufficient general words, which expressly and clearly shew that the testator had no intention to include the reversion of the settled estate in his will, as much as if he had used particular words and expressions to declare it directly and explicitly. It appears clearly upon the very words of the whole will taken together, that there can be no doubt of the testator’s intention that the reversion of the settled estate should not be included in it, but only the lands which he had in possession.”

In *Doe dem. Cholmondeley v. Weatherby and Others* (a), it was held, that a remote reversion of a settled estate would pass by the general words of a residuary clause in a will, by which the testator, —having before devised certain other real estates in strict settlement, and given annuities for life to *A.*, *B.*, and *C.*, which annuities he charged upon “all and singular his manors, lands, tenements, and hereditaments, &c. not before disposed of,” —devised “all and singular his said manors, lands, &c.” and other his real estates so charged with and subject to the said three several annuities as aforesaid; notwithstanding one of the annuitants had a prior life estate in the property: for general words in a residuary clause carry every estate or interest which is not ex-

(a) 11 *East*, 322.

pressly or by necessary implication excluded from its operation; and no intention of the testator to exclude the reversion was necessarily to be implied from the circumstance that the charge of one of the annuities could not attach upon that reversion, as the other two might: the clause would be construed *reddendo singula singulis*.

Also, in *Morgan v. Surman* (a) it was held, that a general residuary clause would carry estates not in the contemplation of the testator, unless the will contained special indications of a contrary intention.

The same principle was acted on in *Goodright dem. Earl of Buckinghamshire v. The Marquis of Downshire* (b), in *Doe dem. Nethercote v. Bartle* (c), in *Doe dem. Moreton v. Fossick* (d), and in *Doe dem. Pell v. Jeyes*. (e) Also upon the construction of an act of parliament in *Freeman v. Duke of Chandos*. (g)

In *Goodright dem. Daniel v. Miles*, there was an express reference to the lands in jointure, so that the testator must have adverted to them at the time of making his will; and upon that point the decision mainly turned.

But in the present case there is much more reason for assuming that the testator had forgotten he was bound by the estate tail created by his father, than that he was aware he had only a reversion in the property. His other estates, over which he had a disposing power, produced only 2750*l.* a year; and yet he orders his debts to be paid, and, upon the failure of issue of his son, he creates a term of 1000 years, under which 40,000*l.* might have been raised for four daughters, in addition to the 30,000*l.* which might have been raised under the term for 500 years. An estate of 2750*l.* a year would have been insufficient to meet these charges; the dispositions of the will, therefore,

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(a) 1 Taunt. 289.

(b) 2 B. & P. 600.

(c) 5 B. & Ald. 492.

(d) 1 B. & Adol. 186.

(e) Id. 593.

(g) Cowp. 363.

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instead of being incompatible with an intention to pass the reversion in question, are such as to demonstrate the necessity of giving the general words their unrestrained effect.

Hodgson in reply. Upon considering the contingencies subject to which the monies were to be raised under the terms of 1000 and 500 years, it will be found that the amount would never exceed 50,000*l.*, so that the estate of 2750*l.* a year was amply sufficient for the purpose: but neither with respect to that sum, nor with respect to his debts, could the testator have intended that the payment should be deferred till the reversion in question, subject, as it was, to be defeated by successive remaindermen, should come into possession after an indefinite lapse of time: *Roe dem. James v. Avis*. In some of the cases relied on for the Defendants, the reversion in dispute passed because it was the only property to answer the general words of devise: in others, as in *Doe dem. Lord Cholmondeley v. Weatherby*, and *Doe dem. Nethercote v. Bartle*, the existing limitations were held to be scarcely inconsistent with the operation of the will.

The following certificate was afterwards sent: —

We are of opinion that the reversion in fee of the manors, estates, hereditaments, and premises in the county of *Chester* and county of the city of *Chester*, passed by the will of Sir *Roger Mostyn*, the words of the devise being sufficient to include such reversion, and no intention to exclude it being expressed in, or necessarily to be implied from, any other part of the will.

N. C. TINDAL.

S. GASELEE.

J. VAUGHAN.

J. B. BOSANQUET.

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VERE v. GOLDSBOROUGH.

Nov. 24.

THE declaration contained two counts: one against the Defendant as the acceptor of a bill of exchange, the other on an account stated.

The plea was as follows:—"And the said Defendant by I. S. his attorney saith, that he did not accept the said bill of exchange in the said declaration mentioned; and for a further plea saith, that he did not account with the said Plaintiff as in the said declaration is alleged."

There was no rule to plead several matters.

The Plaintiff signed judgment; and *Mansell* having obtained a rule *nisi* to set aside this judgment as irregular,

Wilde Serjt. who shewed cause, contended that the pleas, in the form in which they were pleaded, were irregular; for there was no rule to plead several matters; and the pleas, not being restricted, or applied distributively to each of the counts, must be taken to be pleaded in bar of the action generally: *Reg. Gen. Hil. 4 W. 4.* "9th. All pleas shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action."

To a declaration of two counts, one on a bill of exchange, the other on an account stated, Defendant, without a rule to plead several matters, pleaded, "that he did not accept the bill; and for a further plea, that he did not account:" Held, that the informality of omitting to confine each plea to the count to which it applied, did not authorise Plaintiff to sign judgment.

Mansell. It necessarily appears from the subject matter that these pleas must have been pleaded distributively, one to each count of the declaration; an express formal restriction, therefore, would have been superfluous. At all events, the Plaintiff should have demurred specially for the supposed defect, and not have taken upon himself to sign judgment.

24. Wils. 73.
1 each 90.
4 each 43.

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VERB
v.GOLDS-
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TINDAL C. J. I think the Plaintiff should have demurred specially, and not have taken upon himself to sign judgment. The Defendant has fallen into a breach of the rules of pleading rather than of practice; and the question, if necessary, might have been raised upon special demurrer.

GASELEE J. These are two separate pleas, informally pleaded, no doubt. But the informality is not such as to render the pleas nullities, and authorize the Plaintiff to sign judgment. The objection should have been taken, if at all, on special demurrer.

VAUGHAN and BOSANQUET Js. concurred.

Rule absolute.

Nov. 24.

FIGOU v. DRUMMOND.

Outlawry;
when an
abuse of pro-
cess.

THE Plaintiff, knowing that the Defendant was abroad, and that he was represented by an attorney in this country, without making any application to the Defendant's attorney, sued out a *capias* against the Defendant, with orders to the sheriff to return *non est inventus*, and then proceeded to outlawry.

Wilde Serjt., upon affidavit of these facts, having obtained a rule *nisi* to set aside the outlawry with costs,

Talfourd Serjt., who shewed cause, contended, that as there was no other mode by which the Plaintiff could be sure of compelling an appearance, the outlawry ought to stand. But

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The Court thought that the Plaintiff's proceeding in this manner, without making any application to the Defendant's attorney, was an abuse of the process of the Court, and made the rule

Absolute.

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PIGOU
v.

DRUMMOND.

LOCKINGTON, Demandant; SHIPLEY and Wife,
Conusors.

Nov. 24.

W. H. WATSON moved to amend a fine, by substituting for the parish of *Burton Latimer*, which was mentioned by mistake in the fine, the parish of *Isham*, in which, according to the deed to lead the uses, the premises were situated.

The Court refused to amend a fine in a case of misdescription cured by 3 & 4 W. 4. c. 74. s. 7.

He referred to the statute 3 & 4 W. 4. c. 74. s. 7., by which it is enacted, "That if it shall be apparent from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission;" but contended, that this did not exclude the jurisdiction of the Court in matters of amendment, which, indeed, by sect. 9., is expressly reserved in cases not provided for by the act; and in the present instance,

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LOOKINGTON,
Demandant;SHIPLEY
and Wife,
Consors.

a purchaser had refused to accept the title unless the amendment were sanctioned by the Court.

TINDAL C. J. Here is a misdescription apparent on the face of the instrument, within the meaning of sect. 7. of 3 & 4 W. 4. If we accede to your application, we shall be in the same situation as before the act—called on to amend, upon every conveyancer's doubt,—and all the expense will be incurred which the act was passed to prevent. Without deciding the question of jurisdiction, we think that, under sect. 7., you do not stand in need of our interference.

Watson

Took nothing.

Nov. 24.

CLEMENTSON v. WILLIAMSON.

Where a prisoner has been served with a rule to plead, the omission of an indorsement of notice to plead, on the declaration, will not render irregular a judgment signed for want of a plea.

MANSELL obtained a rule *nisi* to set aside interlocutory judgment,—signed for want of a plea on a writ of detainer,—on the ground that no notice to plead had been indorsed on the declaration delivered to the Defendant in prison. He had, however, been served with a rule to plead.

Wilde Serjt., who shewed cause, contended, that the service of that rule was sufficient.

Mansell. The notice to plead was necessary; for by *Reg. Gen. Trin.* 3 W. 4., in all actions against prisoners, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

But, upon conferring with the prothonotary,

The Court said, it was in daily practice for these declarations, in actions against prisoners, to be delivered without any indorsement of notice to plead.

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CLEMENTSON
v.

Rule discharged. WILLIAMSON.

Mansell made another objection, which was overruled as coming too late.

ROSE v. MAIN.

Nov. 24.

THIS was an action by the drawer against the acceptor of a bill of exchange for 70*l.*, bearing date the 16th of *November* 1832, and payable twelve months after date.

The Defendant pleaded first the general issue; secondly, that he became a bankrupt on the 24th of *December* 1832, and that the supposed cause of action, if any, accrued to the Plaintiff before the bankruptcy; and at the trial before *Tindal* C. J. it appeared,

That the Plaintiff, to whom the Defendant owed nearly 400*l.* for goods sold, issued a *fiat* of bankruptcy against the Defendant on the 1st of *November* 1832.

The Plaintiff was appointed assignee on the 12th of *November*, and on the same day proved under the commission to the amount of 140*l.* On the 16th of *November* 1832, the Defendant accepted the bill for which this action was brought: he passed his last examination in the presence of the Plaintiff on the 14th of *December* in the same year: obtained his certificate; which was signed by the Plaintiff, and, according to the Defendant's deposition, was obtained fairly and without fraud. The bankrupt's estate had hitherto paid no dividend.

On the part of the Defendant, it was contended that

A bill of exchange for a portion of his debt, given by a bankrupt, after commission and before certificate, to his assignee, who was also petitioning creditor, and had proved for the residue of his debt, Held void in the hands of the assignee.

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ROSE

v.

MAIN.

it was contrary to the policy of the bankrupt laws, to allow a petitioning creditor to sue on a bill of exchange obtained by him from the bankrupt for a portion of his debt, between the *fat* and the last examination of the bankrupt. The tendency of such a proceeding would be to oppress bankrupts, and injure the general body of their creditors.

A verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside and enter a nonsuit instead, and

Kelly having, on the ground above stated, obtained a rule *nisi* to that effect,

Barstow shewed cause.

The bill having been given without fraud, there is no objection to the Plaintiff's recovery. In *Brix v. Braham* (a), where a bankrupt having promised, after his bankruptcy, and before certificate, to pay a debt due before the bankruptcy, indorsed to the Plaintiff two promissory notes for that purpose, it was held, that his certificate was no bar to an action on those notes. The circumstance that, in the present case, the Plaintiff is assignee under the bankruptcy, makes no difference, for he cannot prefer himself to the other creditors, and the statute has in no way distinguished him from them. [*Tindal* C. J. But he has an interest that all the bankrupt's property should not be brought into the common fund; so that his interest is in conflict with his duty.] That conflict exists in many other cases, but it has never been deemed sufficient, of itself, to render void a transaction in which there is no fraud. This bill would not be void in the hands of an indorsee; the Plaintiff, therefore, having given value, is as much entitled to recover

(a) 1 *Bingh.* 281.

1834.

 ROSEN
v.
MAIN.

as an indorsee. And the legislature seems to have contemplated the possibility of the bankrupt's giving a bill under circumstances such as the present, by enacting, (6 G. 4. c. 16. s. 131.) "That no bankrupt, after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, contract, or agreement be made in writing."

Kelly. In *Brix v. Braham* the plaintiff was neither petitioning creditor nor assignee. If the assignee be allowed to take securities of this sort before the bankrupt has obtained his certificate, the general fund for the creditors will be in danger of diminution from the assignee's endeavour first to ensure the payment of his own debt. Section 131. of the Bankrupt Act must, therefore, be taken to apply to securities given after certificate.

TINDAL C. J. This rule must be made absolute; the Plaintiff, petitioning creditor and assignee of the bankrupt, having by his voluntary act put himself in a situation in which his duty and his interest conflict.

Under the eighth section of the Bankrupt Act, which has not been referred to at the bar, it appears clearly to be the intention of the legislature that securities taken under such circumstances should be void. It enacts, that "if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt or any

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v.
MAIN.

part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such payment, gift, delivery, satisfaction, or security, shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission to be valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof." In this section the legislature contemplated a security given by the person against whom a docket is struck, in the interval between the docket and commission. Here, the security was given after the commission had issued, and before the bankrupt had obtained his certificate. But when we see the intention of the legislature in avoiding every payment or security given by the bankrupt to the party striking a docket, in the interval between docket and commission, the principle applies more strongly when the security is received by the assignee himself, after the commission and before the bankrupt has obtained his certificate. The present case, therefore, though not within the very letter of sect. 8., is within the mischief which the legislature intended to prevent; and, therefore, this rule must be made absolute.

GASELEE J. I am of the same opinion. Independently of sect. 8. of 6 G. 4., I think, on the general policy of the bankrupt law, this action could never lie; for a petitioning creditor who sues out a commission, is appointed assignee, and then takes from the bankrupt

a security for half his debt, before the certificate has been granted, or the estate has paid a single dividend.

But sect. 8. puts it beyond all doubt; for, according to that, the giving such a security is not only an act of bankruptcy, but the person taking it is liable to repay the full value of all that he receives.

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v.
MAIN.

VAUGHAN J. We should abet a gross fraud on the principle of the bankrupt law if we expressed any doubt in this case. *Brix v. Braham* does not apply: for the plaintiff, there, was not assignee, and had not proved his debt; and there being a good moral consideration, he was entitled to sue on the bill, as had before been ruled in *Trueman v. Fenton (a)*, and *Birch v. Sharland (b)*. Here, the Plaintiff has proved his debt; is petitioning creditor and assignee; and the security he has taken is made the subject of a distinct act of bankruptcy by sect. 8. of 6 G. 4. c. 16.

BOSANQUET J. I am of the same opinion; and our decision is perfectly compatible with the case of *Brix v. Braham*, where the plaintiff did not stand in the same situation.

Here, he is petitioning creditor and assignee. His taking this security raises a conflict between his interest and his duty; and would equally have done so, even if he were only petitioning creditor.

Whatever difficulties he might experience in interfering improperly with the distribution of the bankrupt's estate, the object of the security was, to give him an advantage over the other creditors. It is on that ground that securities given to a particular creditor for a portion of his debt, by a debtor who executes a composition deed with his creditors at large, have always been

(a) *Cowp.* 544.(b) 1 *T. R.* 715.

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ROSS
v.
MAIN.

esteemed void in the hands of a party to the deed. But sect. 8. of 6 G. 4. clearly shews that the legislature had an eye to transactions of this sort, and intended to set them aside.

Rule absolute.

Nov. 25.

BOSLER v. LEVY.

Quære, whether a writ of *capias* ought to disclose the county of the Defendant's residence.

ATCHERLEY Serjt. obtained a rule *nisi* to set aside the copy of the writ of *capias* in this cause, and to cancel the bail-bond given by the Defendant, on the ground,

1st, That the Defendant was described as of *Leman Street, Goodman's Fields*, without any mention of county, city, town, or parish.

2dly, That the indorsement on the copy stated the writ to have been issued by *Henderson and Smith*, of *Leman Street, Goodman's Fields*, without any mention of county, city, town, or parish.

3dly, That the day on which the writ issued was not specified.

He pointed out that the form of the *capias* given in the schedule of 2 W. 4. c. 39. runs, as to the description of the Defendant, thus,—“*C. D.* of ———;” and that, according to the opinion of *Tindal* C. J., delivered in *Roberts v. Wedderburne* (a), sect. 4., which prescribes the form of *capias*, is to be construed by sect. 1., which prescribes the form of the writ of summons; and in that writ it is required to state the county in which the Defendant resides.

(a) 1 New Cas. 4.

If the omission of the county renders the description of the Defendant insufficient, the omission must have a similar effect in the description of the Plaintiff's attorney, who is required to state his place of abode.

1834.

 BOSLERN
v.
LEVY.

Comyn shewed cause. The form given in the schedule of the act for the writ of *capias* does not specify the county of the Defendant's residence, although the form for the writ of summons does. And there is good reason for the difference, since the *capias* is executed by the sheriff, who cannot go out of his county. Sect. 4., therefore, ought not to be construed by analogy to sect. 1.

With respect to the Plaintiff's attorney, all that is required is a description of his place of abode; and in *Engleheart v. Eyre* (a), "*Ely Place*" was held a sufficient description of the attorney's place of abode.

And the act does not require that the day on which the writ issued should be specified: *Webb v. Lawrence*. (b)

Then, the motion should have been to set aside the writ; for if the copy be wrong, as suggested, the writ is wrong: and if the writ be right and the copy wrong, the writ still remains in force though the copy be set aside.

[*Tindal* C. J. The Defendant can only act on the copy—he never sees the original. And by using the word *copy*, he does not mean to affirm that this is an exact copy of the writ, but that it is the piece of paper delivered to him and called a copy.]

Atcherley was heard in support of his rule.

(a) 2 Dowl. Pr. Cas. 146. see *Constable v. Johnstone*, 1 Cr. & Mee. 88.
(b) 1 Cr. & Mee. 806. But

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TINDAL C. J. The only objection on which any doubt remains on the mind of the Court, is, that the copy of the writ describes the Defendant as of *Leman Street, Goodman's Fields*, without specifying any county. Upon reference to the distinction between sect. 1. of 2 W. 4. c. 39. which gives the writ of summons, and sect. 4. which gives the writ of *capias*, and also to the distinction in the schedule, which, in the one case, specifies the county, and in the other leaves only a blank, I think it was not necessary to state the county of the Defendant's residence in the copy of this writ of *capias*.

With respect to a writ of summons, the first section of the act prescribes, that the process shall be according to the form in the schedule annexed, marked No. 1.: and with respect to a writ of *capias*, the fourth section prescribes, that the process shall be according to the form in the schedule annexed, and marked No. 4.

Now, when we look at the form for the writ of *capias*, it runs, "To the sheriff of ——— greeting: We command you," &c., "that you take C. D. of ——— if he be found in your bailiwick."

But, upon referring to the preceding form for a writ of summons, it runs, "*William the Fourth*," &c., "To C. D. of ——— in the county of ——— greeting: We command you," &c.

It would seem, therefore, that the mention of the county has been required in the writ of summons, and not in the writ of *capias*. And there may be this reason for the difference: that the writ of summons is addressed to the Defendant, and executed by the Plaintiff or his attorney, who ought to be confined, by the authority expressed on the face of the writ, to serve it in the county in which it is sued out; whereas the *capias* being addressed to the sheriff, who cannot go out of his county, the specification of the county in the body of that writ

becomes unnecessary. In *Roberts v. Wedderburne*, the very point now in discussion was not before me, and I do not feel bound to adhere to what I said with respect to construing sect. 4. by reference to sect. 1.

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GASELEE J. I differed from the rest of the Court in *Roberts v. Wedderburne*, and should hold the description of the Defendant sufficient here.

The writ of summons is addressed to the Defendant; and, in order to identify him, it may be necessary to specify in what county he resides. The *capias* is addressed to the sheriff, who knows whether the place of which the Defendant is described is situated within his own county or not.

VAUGHAN J. I should have been better satisfied with a better description. If *Leman Street, Goodman's Fields*, will do, so would *Broad Street*, or any other, less notorious. A literal compliance with the statute occasions the least inconvenience.

BOSANQUET J. I am sorry I cannot agree with the Chief Justice and my brother *Gaselee*. The act requires a literal compliance with the forms set out in the schedule, and we are not to enquire whether words which have been used are equivalent, or whether the place specified is or is not notorious.

SECT. 1. directs that the writ of summons shall be in the form marked in the schedule No. 1., and sect. 4. that the writ of *capias* shall be in the form marked in the schedule No. 4. Does that enactment include the directions contained in No. 1.? Does "C. D. of——" mean that the blank should be filled up as in the form marked No. 1., or does it allow greater latitude for the description of the Defendant? I think the fourth section should be construed with reference to the first, as was

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laid down in *Roberts v. Wedderburne*. There the blank in the *capias* for the Defendant's residence had not been filled up at all, and it was held that it ought to have been filled up by analogy to the form for a writ of summons, marked No. 1. in the schedule. I consider that, therefore, an express decision that sect. 4. is to be construed by sect. 1., and though it is true that in this case no person can have been misled, I think the rule should be made absolute.

TINDAL C. J. One circumstance which has operated with me is, the direction in the schedule for the indorsement on the writ of *capias*, in which indorsement no statement is required of the county in which the residence of the Plaintiff or of his attorney is situated.

The Court being equally divided, no rule will issue.

Nov. 25.

WATSON v. MASKELL.

Where one judgment is set off against another, the lien of an attorney does not extend beyond his costs in the particular cause.

AT the *Essex* Spring assizes, 1834, *Watson*, the Plaintiff in this action, obtained a verdict for 200*l.* against *Maskell*. *Watson's* costs were afterwards taxed at 139*l.*

At the same assizes, *Maskell*, in an action in the King's Bench, obtained a verdict for 536*l.* against *Watson*; but a rule *nisi* to set aside this verdict was obtained in *Easter* term.

Maskell died on the 18th of *April*. On the 21st *Watson* signed judgment in this action, and on the 22d issued a *fi. fa.* indorsed to levy 339*l.*, and tested the 15th of *April*, the first day of *Easter* term.

On the 26th of *April* a rule *nisi* was obtained to set aside this *fi. fa.* for irregularity; the time for shewing

cause against which was afterwards, by a rule of Court, enlarged to the 7th of *May*.

On that day the rule for setting aside the *fi. fa.* was discharged; the executors of *Maskell* agreeing to pay 339*l.* into Court, there to remain till the further order of the Court, and to refer all matters in difference between them and *Watson* to a barrister.

In consequence of this, no further steps were taken on the rule for a new trial in the action by *Maskell* against *Watson* in the King's Bench.

Maskell's executors claimed before the arbitrator 1268*l.* as due to their testator from *Watson*, besides the costs of the action in the King's Bench, if they should be found entitled to sustain their verdict.

Watson claimed 977*l.* as due to him from *Maskell* for rent, besides the 339*l.* debt and costs he had recovered in the action in this court.

The arbitration being still undetermined,

Wilde Serjt., on the part of *Watson's* attorney, obtained a rule calling on the executors of *Maskell* to shew cause why it should not be referred to the prothonotary to ascertain what was due from *Watson* for business done by his attorney generally, and why such sum should not be paid to the attorney out of the 339*l.* paid into court in the action of *Watson v. Maskell*.

A copy of this rule was also served on *Watson*, who was a prisoner in the King's Bench.

Goulburn Serjt. and *Hayes* shewed cause.

The 339*l.* having been paid into Court by *Maskell's* executors, to abide the order of the Court in case the arbitrator should decide in their favour upon the action in which *Maskell* has recovered a verdict, they will be deprived of the benefit of that compact so sanctioned by the Court, if *Watson's* attorney be allowed to possess

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himself of the money before the result of the arbitration is known.

But, at all events, he can claim no more than his costs in the particular action: he has no *general* lien on the money for the amount of all that may be due to him from *Watson*; for in *Stephens v. Weston* (a) it was held that when costs and damages in one action are to be set off against those recovered in a cross action, an attorney has a lien on the judgment obtained by his client against the opposite party, to the extent of his costs in that cause only. [The learned counsel also urged and relied on in opposition to the rule, an alleged irregularity on the part of *Watson*, in entering up judgment and proceeding to execution after *Maskell's* death, without a *scire facias*. But the Court thought that question had been settled upon the rule which was discharged *May 7th*.]

Wilde. It is an established principle that the equitable claims of the parties to the suit are not to prejudice the lien of the attorney. It is clear that if *Watson's* attorney had received the 339*l.* paid into Court subject to the equitable claims of the parties, he would have been entitled to retain the whole for his general balance, if it amounted to so much.

And it was in order to leave the payment into Court open to such a claim, that it was paid in, not to abide the event of the arbitration, but the order of the Court.

TINDAL C. J. This rule must be made absolute to the extent of 139*l.*, but no further. As to that—the amount of the applicant's costs in the particular cause,—his lien cannot be prejudiced by any thing that the parties have done. But further than that we cannot proceed with safety. Upon the discussion of a rule to

(a) 3 B. & C. 535.

set aside for irregularity the *fi. fa.* which had been issued against *Maskell's* effects, the rule was discharged, all matters in difference between the parties being referred to an arbitrator, upon an agreement that the 339*l.* recovered by *Watson* should be paid into Court, to abide the further order of the Court; and before we order it all to be taken out, we should see clearly that it can be done without injury to others who may have an equitable claim thereon.

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The rest of the Court concurred, and the rule was made

Absolute to the extent of 139*l.* only.

HUTCHINSON v. HARGRAVE.

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THE affidavit to hold to bail alleged that the Defendant was indebted to the Plaintiff in the sum of 50*l.* for money paid and expended by the Plaintiff for the use of the Defendant and at his request, and for interest due and agreed to be paid by Defendant for and in respect of the preceding matters.

Affidavit to hold to bail for 50*l.* due for money paid and expended to the use of Defendant, and at his request, and for interest agreed to be paid thereon, Held sufficient.

Addison obtained a rule *nisi* to set aside the bail-bond, on the ground that this affidavit was not sufficiently certain; it should have shewn how much was due for principal and how much for interest, as was required in *Latraille v. Hoepfner*. (a)

Coleridge Serjt. shewed cause. In *Latraille v. Hoepfner*, the arrest was for 70*l.*, "the balance of principal and

(a) 10 Bingham 334.

1834. interest due on a bill of exchange for 100*l*." The Plaintiff could not arrest for interest unless reserved by the bill, which was not stated to be the fact; and possibly less than 20*l*. might have been due for principal. Here he arrests for interest alleged to be due under an agreement. The two demands, therefore, may be combined with the same propriety as demands for goods sold, and work and labour.

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Addison. The Plaintiff should, at least, have disclosed the nature of the agreement. Peradventure it contained no assent by the Defendant to pay interest.

Per Curiam. The word *agreed* imports the assent of both parties. The affidavit is sufficiently certain.

Rule discharged.

Nov. 24.

FLIGHT v. BOOTH.

The particulars of sale of certain leasehold premises in Covent Garden, stated, that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter."

THIS cause having, by consent of parties, been referred to arbitration under an order of *nisi prius*, the arbitrator found, in a special award,

That the declaration in this action was for money paid by the Plaintiff for the Defendant's use, and for money received by the Defendant to the Plaintiff's use, to which the general issue was pleaded; and the action

The original lease, when produced, appeared to prohibit the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working-hatter, and many others, and the sale of coals, potatoes, or any provisions: Held, that there was such a material discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract.

6 Beav 595
1 M & W 529
3 B & F 1322
1326

9. B. & C. 165.
31 Beav. 382.

was brought to recover the sum of 100*l.* paid by the Plaintiff as a deposit on the purchase by auction of certain premises situated in the *Piazza, Covent Garden*, and held under a lease from the Duke of *Bedford*. The premises were described in the printed particulars of sale, on the back of which the Plaintiff had signed the memorandum of the contract, as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea trade, or coach-building. It was also stated in the same particulars, that, by a clause in the lease, "the lessee is to insure the premises for 3000*l.*, and no offensive trade is to be carried on; they cannot be let to a coffee-house keeper, or working hatter." Printed conditions of sale followed; and by the sixth it was provided, that if, through any mistake, the estate should be improperly described or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money, as a compensation either way. By the last condition it was, among other things, provided, that if the purchaser should neglect or fail to complete the purchase within a day, which had expired previously to the commencement of the action, the deposit money should become forfeited to the vendor. The sale took place, and the contract was signed, on the 16th of *May* 1833. On the 10th of *June* an abstract of title was delivered by the vendor's solicitor to the Plaintiff's, which contained the following note of the proviso hereinafter set out, — "proviso for re-entry in case of non-payment of rent, or non-performance of covenants, or carrying on any particular trade without a licence for that purpose under the hand of the Duke of *Bedford* first had and obtained." At the date

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of the sale and contract the lease was a valid and subsisting one. The Plaintiff's solicitor made several objections upon the abstract to the completion of the purchase, which the arbitrator found to have been either insufficient in themselves or satisfactorily removed; but the Plaintiff's solicitor never required to see the lease. And on the 15th of *July* the Plaintiff, so far as in him lay, rescinded the contract; and having demanded back again the deposit, without success, brought the action in question.

At the trial of the cause the lease was produced, and appeared to contain the following proviso: — "Provided always, that if the yearly rent hereby reserved, or any part thereof, shall be unpaid for fifteen days next after any of the said days of payment; or if, at any time during the continuance of the said term, the trades or businesses of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheesemonger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter, or any or either of them, shall be used or exercised in or upon the said demised premises, or any part thereof; or any auctions or public sales of household goods, or other things, be made in or upon the said premises or any part thereof; or the same be used as a shop or place for the sale of coals, potatoes, or any provisions whatever; or if the lessees, their executors, administrators, or assigns, shall, at any time during the last seven years of the said term, assign or set over this indenture, or any part of the premises, and their estate and interest therein, without a licence for that purpose under the hand of the said duke, his heirs or assigns; or on breach or non-performance of any or either of the covenants and agreements hereinbefore contained; then and thenceforth, and in either of

such cases, it shall be lawful for the said duke, his heirs and assigns, to re-enter."

It was not proved before the arbitrator that the Plaintiff, at the time of the sale, or of the signing the contract, had ever seen the lease or heard it read, or that he or his solicitor were aware of the terms of the proviso until the day of the trial. Evidence was offered, on the part of the Defendant, to prove that the lease was produced at the sale, and that the proviso had been publicly read. That evidence was objected to on the part of the Plaintiff's counsel; the arbitrator received it only to negative any wilful concealment or misrepresentation by the Defendant of the terms of the lease; and found that none such was proved against him. No claim was made by the Defendant, before the arbitrator, for damages for the non-performance of the Plaintiff's contract, nor any attempt to compel a specific performance.

Upon these facts, the arbitrator found that the Plaintiff had good cause of action against the Defendant, and ordered that the verdict should be reduced to the sum of 100*l.*; for which sum, and the costs of the cause when taxed, he directed that the Plaintiff should be at liberty to sign judgment on the sixth day of *Trinity* term then next ensuing, and not before. And if the facts above set out did not authorize the Plaintiff, in the opinion of the Court, to rescind the contract of sale, then the arbitrator directed the verdict to be entered for the Defendant, and that he should be at liberty to enter up the judgment for himself.

Taddy Serjt. obtained a rule *nisi* to enter up judgment for the Defendant under this award, contending, that if there had been any misdescription of the premises at the auction, it was a misdescription originating from inadvertence, and not from fraud or any intention to

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mislead; and that, under such circumstances, though the Plaintiff might require compensation for any difference in value between the representation and the reality, yet he could not rescind the contract; *Duke of Norfolk v. Worthy* (a), *Wright v. Wilson* (b), *Stewart v. Alliston* (c), *Trower v. Newcombe*. (d)

Wilde Serjt. shewed cause. Where the misdescription, whether proceeding from intention or inadvertence, is such that the purchaser finds himself in possession of a thing materially differing from that which he proposed to buy, he is at liberty to rescind the contract; *Jones v. Edney* (e) *Waring v. Hoggart* (g), *Coverley v. Burrell* (h), *Brealey v. Collins*. (i) Here the plaintiff could never have inferred from the particulars prohibiting offensive trades and the business of coffee-house keeper and hatter, that he should be prevented from selling fruit or vegetables in a district devoted to that line of business. There is no principle upon which, in such a case, compensation can be calculated; *Sherwood v. Robins*. (k) The object of the purchaser is entirely defeated, and he can only be indemnified by rescinding the contract. In *Tomkins v. White* (l), Lord *Ellenborough* said, "A little more fairness on the part of auctioneers in the forming of their particulars would avoid all these inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and, in favour of justice, considering how little knowledge the parties have of the things sold, much more particularity and fairness might be expected of them."

(a) 1 *Campb.* 337.(b) 1 *Mood. & Rob.* 207.(c) 1 *Mer.* 26.(d) 3 *Mer.* 704.(e) 3 *Campb.* 285.(g) 1 *Ry. & Mood.* 39.(h) 5 *B. & Ald.* 257.(i) 1 *Young.* 317.(k) 1 *M. & M.* 194.(l) 3 *Smith, Rep.* 439.

In *The Duke of Norfolk v. Worthy* the jury found that the misdescription was wilful. *Trower v. Newcombe* only decided that *bonâ fides* is not to be impeached by the mere babble of an auction room. But *Stewart v. Alliston* is in favour of the Plaintiff.

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Taddy and *Cresswell* in support of the rule. As to the possibility of the Plaintiff's intending to deal in vegetables, the alleged misdescription could not have misled him, for the house is not described as situated in the market, but in the piazza; and the rule, *caveat emptor*, applies. The lease was read by the auctioneer, and the Plaintiff might have required to inspect it. Even where property is held under a lease containing covenants contrary to custom, a purchaser is not entitled to compensation if he knew of the existence of the lease; *Hall v. Smith* (a), *Walter v. Maude*. (b) The arbitrator having found that there was no fraud, the plaintiff could not rescind the contract; *Oldfield v. Round* (c), *Scott v. Hanson*. (d) If there be any misdescription, the conditions of sale expressly entitle him to compensation, and *Drewe v. Hanson* (e) shews the principle on which it may be estimated.

Cur. adv. vult.

TINDAL C. J. The question in this case arises upon the special facts found by the arbitrator on his award; and it is this, whether the Plaintiff was at liberty under the circumstances stated in the award to consider the contract of sale to be rescinded. For if rescinded, the Plaintiff is entitled to recover the deposit as money had and received to his use; but if the contract is still un-

(a) 14 Ves. 426.

(b) 1 Jac. & Walk. 181.

(c) 5 Ves. 508.

(d) 1 Sim. 13.

(e) 6 Ves. 675.

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rescinded and open, the present action is not maintainable, but whatever injury the Plaintiff has sustained by the misdescription must form the subject of a special action on the contract of sale.

Now the arbitrator having expressly found that no wilful concealment or misrepresentation was proved against the Defendant, we must consider the case as standing clear from any fraud, and take the misdescription of the premises to have originated either from ignorance, inadvertence, or accident.

The question, therefore, is narrowed to the single point, whether the misdescription in the printed particulars of sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether; or whether it was such as was contemplated by the sixth condition of the printed particulars of sale, by which it was provided, that "if through any mistake the estate should be improperly described, or any error or mistatement be inserted in that particular, such error or mistatement should not vitiate the sale thereof; but the vendor or purchaser, as the case might happen, should pay or allow a proportionate value according to the average of the whole purchase-money as a compensation, either way."

It is extremely difficult to lay down, from the decided cases, any certain definite rule which shall determine what mistatement or misdescription in the particulars shall justify a rescinding of the contract, and what shall be the ground of compensation only. All the cases concur in this, that where the mistatement is wilful or designed, it amounts to fraud; and such fraud, upon general principles of law, avoids the contract altogether. But with respect to mistatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no mistatements which originate in carelessness,

b Clark & Hin 326

however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk v. Worthy* (a), *Wright v. Wilson* (b); whilst other cases lay down the rule, that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale; *Jones v. Edney* (c), *Waring v. Hoggart* (d), and *Stewart v. Alliston*. (e) In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in *Jones v. Edney*, where the subject-matter of the sale was described to be "a free public house," while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal.

In the case under discussion the particulars represent the house as calculated for an extensive business in various trades therein enumerated; to which it was added, "that no offensive trades are to be carried on: the premises cannot be let to a coffee-house keeper or working hatter." Any person reading this particular, and having no information but what he derives from it, that is, perhaps, every person attending the sale, would conclude, that he was not prevented by the terms of the

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(a) 1 *Campb.* 340.(d) 1 *Ry. & Mood.* 39.(b) 1 *Mood. & Rob.* 207.(e) 1 *Mer.* 26.(c) 3 *Campb.* 284.

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lease from carrying on any trade in it, except those which were of a class generally acknowledged to be offensive, and the two enumerated trades of coffee-house keeper and working hatter. He would never suppose, nor have any reason to suppose, that he was prevented from carrying on the trade of a baker, a fruiterer, or a herb-seller, in a house situated in the piazza of *Covent Garden* market, much less that the lease was to become void, if the house, so situated, was used as a place for the sale of any provisions whatever. The latter restriction would extend to prevent trades of the most innocent and inoffensive kinds from being exercised on the premises; such as a flour factor, a biscuit seller, or the like; yet such are the restrictions found to exist in the lease when it is first submitted to the inspection of the purchaser. Under these circumstances, it appears to us, that a lease which is described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades but also against some trades that are inoffensive, are not one and the same thing, but a different subject-matter of contract; and that where a man purchases by the former description, it may very well be supposed that he would not have become the purchaser, whether he bought for the purpose of carrying on trade upon the premises himself, or for a money investment, if he had known the lease had contained the larger and more extensive restrictions; and, indeed, the very terms of the sixth condition of sale scarcely apply to a case where the difference of value is so uncertain and arbitrary as in the present case. The condition, that the parties are to pay or allow a proportionate value according to the average, will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple calculations of that nature; but how will it govern such a misstatement as the present? What

action at law can be framed upon it? It would at least involve the purchasers in great difficulties. The lease being in the hands of the vendor, he had peculiarly, and indeed exclusively, the means of knowledge of the exact restrictions contained in it; the purchaser at the auction had none. For the reading the lease at the auction by the auctioneer has been decided to be no excuse for a misdescription of the terms of the lease in the particulars of sale. (a) And as to any laches on the part of the purchaser in not sooner demanding an inspection of the lease, which was urged as an argument on the part of the Defendant, he had not the most distant reason to suspect any misdescription, until the abstract was delivered, and then the suspicion would come too late; for the question is, whether he was bound or not at the time the contract was made. If, indeed, there had been any waiver of the objection in this case, our decision would have been different; but a waiver should have been found by the arbitrator: and so far as can be inferred from the facts found upon the award, the lease was never seen by the purchaser, nor the objection ever taken, until the trial of the cause. He stood then, as he might do, upon his legal right to recover the deposit.

Upon the whole, we see no reason to be dissatisfied with the arbitrator's award, and therefore the rule for entering the verdict for the Defendant must be discharged.

Rule discharged.

(a) *Jones v. Edney*, 3 Campb. 285.

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Nov. 25. PRICE v. PEEK, HUMPHREY, WILLIAM JACKSON,
and RICHARD JACKSON.

In trespass against bailiff and sheriff, for taking Plaintiff on a charge of felony to a police station, and thence to a prison, the sheriff, after pleading the general issue, justified the taking from the police station to the prison under a *ca. sa.* The Plaintiff, admitting the writ, and the delivery of the warrant to the bailiff, replied *de injuria absque residuo causæ* :

Held, that under this replication he could not give evidence to involve the sheriff in the misconduct of the bailiff committed before the

THE Plaintiff in his first count declared against the four Defendants for assaulting him, seizing him, dragging him about, and compelling him to go to a certain police station and there imprisoning him on the 19th of *January* 1834, without reasonable or probable cause, for an hour, under a false and malicious pretence that he had committed a felony; and also for then and there taking and conveying him in custody from the said police station to *White Cross Street* prison, and there imprisoning him from thence until the 28th of *January*. To this declaration the two Defendants *Peek* and *Humphrey*, separating themselves from the other Defendants, pleaded, first, the general issue, not guilty, to the whole; and, secondly, as to the assaulting the Plaintiff in the first count mentioned, and seizing him, and taking him into custody from the said police station to *White Cross Street* prison, and there imprisoning him,—a justification under a writ of *ca. sa.* issued out of this Court against the Plaintiff directed to the sheriffs of *London*, and which writ they averred to have been delivered to them as such sheriffs, and that they made their warrant thereon directed to another of the Defendants, *William Jackson*, then being a serjeant at mace of the said sheriffs, which warrant was delivered to *William Jackson*, to be executed in due form of law: by virtue of which said warrant the said *William Jackson* gently laid hands on the Plaintiff and seized and laid hold of him, to take and arrest, and did arrest and take

Plaintiff arrived at the police station: in order to the admission of such evidence, the circumstances should have been replied specially.

him into custody by virtue of the said writ and warrant, and took and conveyed him from the said police station to *White Cross Street* prison, and there imprisoned him. The replication admitting the issuing of the writ, the delivery of the writ to the sheriffs, the making of the warrant, and the delivery of the same to the serjeant at mace, traversed the residue of the cause stated in the plea. In effect, the replication denied that the trespasses enumerated in the plea were committed under the warrant so delivered to *William Jackson*.

At the trial, it appeared that the Defendants, *Peek* and *Humphrey*, in their capacity of sheriffs of *London*, issued a warrant to the Defendant, *William Jackson*, a serjeant at mace, to arrest the Plaintiff under a writ of *capias ad satisfaciendum* directed to the sheriffs of *London*.

William Jackson, in order to secure the capture, stationed his son, the Defendant *Richard Jackson*, at one door of the Plaintiff's residence in the *Temple*, while he himself remained with the warrant in his hand at another door.

The Plaintiff was shortly afterwards arrested in *Fleet Street*, by *Richard Jackson*, who, not having any warrant to produce, gave the Plaintiff in charge of a policeman under pretence of an accusation of felony.

The Plaintiff was taken in custody to a police station. *Richard Jackson* went to his father, who, upon hearing of the capture, placed the warrant in his son's hand, and returning with him to the police station, enforced the arrest, and conducted the Plaintiff to *Whitecross Street* prison, whence, after a detention of some days, he was discharged by order of a Judge.

The jury having found a verdict for the Plaintiff, with 100*l.* damages, expressly for the whole of the trespasses and imprisonment,

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Bompas Serjt., on the part of the sheriffs, obtained a rule *nisi* for leave to enter a nonsuit, or for a new trial, on the ground, first, that the sheriffs had by their plea and evidence justified the detainer at the police office and the custody in *Whitecross Street* prison, under the warrant delivered to *William Jackson*, and that they were not responsible for the previous illegal arrest by *Richard Jackson*; *Drake v. Sykes*. (a) Secondly, even if they were so responsible, the Plaintiff could not avail himself of such responsibility on pleadings framed as these were framed: instead of denying that the sheriffs acted by virtue of the writ, he should have replied specially the facts which would shew them to be trespassers *ab initio*; *Lucas v. Nockells* (b), *Bardons v. Selby*. (c) As he had not so replied, the sheriffs could not be liable to damages for that portion of the alleged trespasses which constituted the imprisonment at *Whitecross Street*; and as the verdict was expressly found against them for the whole of the trespasses, it could not stand.

Spankie Serjt., *R. V. Richards*, and *Price*, shewed cause against the rule.

The conduct of the two *Jacksons* shews clearly that they were acting in combination against the Plaintiff, and that the illegal conduct of the son took place under the instructions of the father who held the sheriff's warrant. And the sheriffs are responsible for whatever the father did or sanctioned under that warrant; *Ackworth v. Kempe* (d), *Parrott v. Mumford* (e), *Saunderson v. Baker* (g), *Smart v. Hutton*. (h) Indeed this Court has already determined on these facts, that the

(a) 7 T. R. 113.

(b) 10 Bingh. 157.

(c) 9 Bingh. 756.

(d) Doug. 40.

(e) 2 Esp. 585.

(g) 3 Wils. 309.

(h) 2 N. & M. 426.

arrest was illegal by the wrongful act of the sheriff himself; *Barrett v. Price*. (a) There can be no ground, therefore, for a nonsuit. As to the application for a new trial, the Defendants having abused the writ intrusted to them, the proper replication to a plea justifying under the writ, was, that they acted of their own wrong, and without the excuse set up by them. That is the true result of the case of *Lucas v. Nockells*: *Com. Dig. Pleader*, F. 24. If, under such circumstances, a plaintiff were to reply specially, it would be ill; *Com. Dig. Pleader*, F. 6., *Wimbish v. Tailbois*. (b)

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Bompas and *Martin* in support of the rule.

Where a defendant acts under a writ, but acts in an illegal manner, the special circumstances which constitute the illegality ought to be shewn in reply to a justification under the writ. Where a defendant, notwithstanding he is in possession of a writ, in no respect acts in pursuance of it, the plaintiff may reply generally that he acted of his own wrong, and without the cause alleged.

In *Lucas v. Nockells* the defendants did nothing under the *fi. fa.* but sold the goods as importers, and not as execution-creditors. Here the Defendants, from the time the Plaintiff arrived at the police station, expressly detained him under the *ca. sa.* The Plaintiff, therefore, if he meant to make them responsible for what previously occurred, should have replied specially; *Taylor v. Cole* (c), *Dye v. Leatherdale*. (d)

But *William Jackson* was only the sheriff's deputy; and as a deputy has no power to depute, the sheriffs could never be responsible for the conduct of *Richard*

(a) 9 Bingham. 566.
(b) Plowd. 51, 52.

(c) 3 T. R. 292.
(d) 3 Wils. 20.

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Jackson. He was neither their agent, nor was he acting under the writ.

Cur. adv. vult.

TINDAL C. J. (after stating the pleadings, as *ante*, p. 380.). The question now before the Court arises upon a motion made by the sheriffs for leave to enter a nonsuit, or for a new trial. The only ground on which the former branch of the motion is placed in argument is this, that these Defendants, as they contend, are entitled to a verdict in their favour as to the trespasses covered by their special plea, all the facts therein stated and traversed by the replication having been proved by them at the trial; and as to the residue of the trespasses mentioned in the declaration, and to which the general issue is pleaded, there was no evidence whatever against these two Defendants, so as to make any case for the jury.

The second plea appears to us to be confined by the enumeration of the trespasses in its commencement to the period of time beginning with the arrest of the Plaintiff by *William Jackson* at the police station, and terminating with the discharge of the Plaintiff from his imprisonment in *White Cross Street* prison, and so it has been taken in the course of the argument by the Plaintiff's counsel. And this part of the trespass complained of appears to us to have been justified under the writ delivered to the sheriffs, and the warrant made out by them to *William Jackson*, unless such arrest at the police station is made illegal by the previous misconduct of *William Jackson*, a question to which we shall presently revert. For it was proved at the trial, that the arrest at the station house was made by *William Jackson*, having the warrant at that time in his possession, and that the Plaintiff was carried, under the war-

rant, by *William Jackson* from the station house to *White Cross Street* prison, and was there confined under the same warrant, which are the several allegations contained in the plea.

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In order, therefore, to be entitled to a nonsuit, the Defendants must shew that there was no evidence whatever, for the consideration of the jury, of the two Defendants, the sheriffs, having made themselves liable for the assault and imprisonment which took place previous to the arrival at the station house. We think, however, there was evidence given at the trial which made that question proper for the consideration of the jury under the general issue. The possession of the warrant by *William Jackson*, the serjeant at mace, at the time when *Richard Jackson*, his son, caused the Plaintiff to be taken into custody by the police officer in *Fleet Street*; the delivery of the warrant by the father to his son, whilst the Plaintiff was still in custody at the station house, in order, if possible, to cover the illegality of such act of the son; the return of the father with the son to the station house, and his there enforcing the warrant; these were facts properly to be laid before the jury for their determination, whether the illegal act of the son had been committed by the previous authority of the father. And if the jury thought so, they would be right, at all events, in finding their verdict for the Plaintiff as to that part of the trespass which was left uncovered by the justification. For the act of the bailiff in the execution of a writ, though not justified by the writ, is the act of the sheriff himself: as where he takes the goods of *A.* under a warrant upon a *fi. fa.* against the goods of *B.*; *Doug. Rep.* 40.; or, as it has even been held (which is a much stronger case), where the bailiff makes an arrest after the return of the writ; 2 *Esp.* 585. We therefore think the rule cannot be supported in that part of it which prays that a nonsuit may be entered. But the rule, so far as re-

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a new trial, stands upon a different footing. For if the sheriffs are entitled to a verdict upon the issue joined on their special plea, then it follows that, as part of the trespass complained of has been covered by the plea of justification, the entire damages which have been given by the jury for the whole of the trespass and imprisonment cannot be supported.

The several facts of that plea have, as already observed, been proved on the part of the sheriffs, so as to entitle them to a verdict thereon, unless the Plaintiff is at liberty to shew that the original taking into custody was the act of the sheriffs, through their officer, and that such original taking, being illegal in itself, destroys the legality of the subsequent arrest under the writ and warrant. For we are of opinion, as we before decided upon facts arising out of this very transaction in the case of *Barrett v. Price (a)*, that if the son was acting in aid of his father, when he caused the illegal imprisonment of the Plaintiff in the station house, and the father afterwards, knowing of the illegality, availed himself of it, and proceeded to execute the warrant, such previous illegality would affect and run through the whole transaction, and make the subsequent proceedings illegal also.

But the objection made on the part of the Defendants, the sheriffs, is, that even if such should be the facts in the case, the Plaintiff is not at liberty to give them in evidence upon this state of the pleadings, as an answer to the Defendants' pleas; but that, if he intended to avail himself of them for the purpose of converting an act, legal in itself, into an illegal act, he was bound by the rules of pleading to have replied those facts specially. And we are of that opinion. The traverse, *de injuria sua propria absque residuo causæ*, puts nothing in issue, but each and every fact alleged in the special plea, and

(a) 2 Moore & Scott, 634. S. C. 9 Bingham, 568.

not admitted in the replication. In this case it puts nothing in issue but whether the assault and imprisonment mentioned in the plea were committed under colour of the writ and warrant or not. It is true, that under the authority of the case of *Lucas v. Nockells* (a), the Plaintiff may shew under that traverse, that the sheriff did not act under the writ at all; that, although he had it in his possession, he acted at the time for a purpose, and with an object entirely distinct from the execution of the writ, and that he only avails himself of it at the trial, as an excuse for an illegal act. But there is no authority in that case or any other, that where the sheriff has really acted under the writ at the time, and avails himself of it in his plea, the Plaintiff shall be at liberty under this replication to give antecedent matter in evidence to render the subsequent arrest under the writ illegal. Such a reply, as it appears to us, confesses the arrest stated in the plea to have been made under the writ, but avoids it by new matter of fact; and, therefore, like any other matter of confession and avoidance, must be specially pleaded.

It is well established, that where the Plaintiff seeks to avoid any legal excuse for a trespass, by shewing matter subsequent which makes the defendant a trespasser *ab initio*, he is bound to plead such matter, and cannot take advantage of it under the general traverse, *de injuriâ*; &c. (see the authorities collected in 1 *Saund.* 300. *d.* in note); and the case appears to us to be the same upon principle, whether the act done by the Defendant is precedent or subsequent to the execution of the writ; and the reason is undoubtedly the same in each case, viz. that the Defendant ought not to be taken by surprise at the trial.

Upon the ground, therefore, that the present damages are entire for the whole trespass committed, and that

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the Plaintiff is not entitled upon the present state of the pleadings, to recover such damages for the arrest and imprisonment which actually took place under the writ, we think there must be a new trial to ascertain the amount of damages for the taking to the police station, which forms the preceding illegal arrest and imprisonment, in case the jury shall be of opinion that such previous illegal arrest is brought home to the sheriffs. And we think the costs of the former trial should abide the event of the second.

Rule absolute.

Nov. 25.

DENNETT v. PASS and BARTON.

A rent charge is extinguished by a devise, to the grantee, of part of the land out of which the rent charge issues, notwithstanding the devise is expressly made over and above the rent charge.

2. When a charge on the land is clear, and upon the construction of a will it is doubtful whether or not the testator meant to transfer the charge from the realty to the personalty, it will be held to continue a charge on the land.

THIS was an action of replevin tried before *Bayley B.*, *Chester Spring assizes, 1833*, when a verdict was found for the Defendants, subject to the opinion of the Court upon the following case:—

The declaration was for the taking the goods and chattels of the Plaintiff in the township of *Thetwall*, in the parish of *Runcorn* and county of *Chester*. There were two avowries by the Defendant *Mary Barton* in her own right, and the Defendant *Pass* as her bailiff. The first avowry justified the taking as for a distress for six years' arrears of an annuity or rent charge of 200*l.* issuing out of the places in which, &c. among other property, and alleged to be due to the said Defendant *Mary Barton* by virtue of a settlement in bar of dower executed by her husband *Thomas Pickering* in 1775, with power to enter on nonpayment. The second avowry justified the taking as for a distress for six years' arrears

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of an annuity or rent charge of 20*l.* issuing out of the same property, and alleged in the like manner to be due to the Defendant *M. Barton* under the will of her husband. The Plaintiff by his pleas in bar denied that *M. Barton* was seised of the annuities.

Thomas Pickering being seised in fee of the premises, on the 9th and 10th of *May* 1775, by deed of settlement and jointure, in bar of dower, conveyed all his manor, lands, &c., in *Chester* and *Lancaster* to *S. Egerton* and *J. Way*, to various uses during his life, and after his decease, to the use, intent, and purpose, that *Mary Pickering*, if she survived him, should receive an annuity of 200*l.* a year for life, payable out of and chargeable, and charged upon the said manor and lands, &c., in the name and in nature of a jointure in bar of dower, with power of entry to *M. P.* in case the annuity should be in arrear: subject thereto, to the use of such children as the said *T. P.* should by deed or will appoint; and in default of appointment by him, as *M. P.* should appoint: in default of appointment by either, equally amongst the children; and in default of issue, to such uses as *T. P.* should by deed or will appoint, with ultimate remainder in fee to *T. P.* and power to *T. P.* to charge by deed or will to the amount of 15,000*l.* subject to the annuity.

In *June* 1775, *T. P.* by his will, — reciting that he had conveyed all his real estates at *Thetwall* and elsewhere in the county of *Chester* and *Lancaster*, unto *S. Egerton* and *J. Way*, upon the trusts, and to and for the purposes therein mentioned, with a power to raise and appoint any sum or sums of money not exceeding 15,000*l.*, or annuities as therein mentioned, to be paid and applied by the said *S. Egerton* and *J. Way*, as he should by his last will and testament direct and appoint, — “charged all his real estates, except the house and premises given to his wife for life, with the payment of the sums of money and annuities mentioned in his will; and directed his trustees to raise those sums of

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money and annuities by mortgage;" and, first, an annuity of 20*l.* to his wife, *M. P.*, for life, over and above what he had already settled upon her. He then devised to his wife his mansion house at *Thebwall* for life; and also the lands and premises that he then occupied there, being about six or seven fields.

By a codicil of the 5th of *December* 1775, after revoking a devise of his real estate to *T. P. of C.*, and subject to the specific and pecuniary legacies in and by his said will, and in that codicil bequeathed, and not thereby revoked, he gave and bequeathed all the rest, residue, and remainder of his personal estate unto his nephew *H. P.*, to and for his own proper use and benefit: but if his personal estate and effects, not specifically bequeathed, should be insufficient to pay all his just debts, funeral expenses, and the pecuniary legacies therein-before in his said will mentioned, and in case he should happen to die without issue, or there being such, they should happen to die without issue, he gave and devised all that his manor or lordship of *Thebwall*, and all and every his messuages, lands, tenements, and hereditaments, situate, lying and being in *Thebwall* aforesaid, or elsewhere, and every part and parcel thereof, with their and every of their appurtenances, subject to the provisions which, in and by the said will, he had made for his loving wife, to the several uses, intents, and purposes thereafter mentioned; that is to say, to the use of his said nephew, *H. P.*, for life, remainder to his issue in tail, with power to *H. P.* to jointure; so as such limitation or appointment of such jointure should be without prejudice to the provision which, in and by his said will, he had made for his loving wife.

By a second codicil, he provided that as he had left his dear *Mrs. Pickering* the hall of *Thebwall*, and all the lands he then held, for her life; and as it was not intended she should cut down any timber on the premises,

so it was his will and intention that she should have timber from the premises she was to occupy, or any other part of the estate, for gates and stiles, or to repair.

On the 23d of *July* 1776, the said *Thomas Pickering* died, without having altered or revoked the said will and codicils, leaving his wife, the Defendant, who afterwards, by another marriage, became *M. Barton*, him surviving and without issue.

After his death the Defendant, *M. Barton*, entered into or continued in possession under and by virtue of the said devise of the mansion house and out houses at *Thelwall*, which the testator lived in at the time of making his will, with the garden, orchard, fields, and also the lands and premises which the testator occupied at the time of making his said will, being about six or seven fields, and took and enjoyed the rents and profits from thence hitherto.

The mansion-house and premises were, and still are, a part of the said manor or estate of *Thelwall*, upon which the said annuity of 200*l.* was, by the said indentures of lease and release, charged. No payment had been made for the six years preceding the distress, to the Defendant *Mary Barton*, in respect either of the said annuity of 200*l.*, or of the said annuity of 20*l.*

The question for the opinion of the Court was, whether the said annuity or rent-charge of 200*l.* was extinguished by the devise to the said *M. Barton* of a part of the premises upon which the annuity was charged, or out of which the rent-charge was to issue; and by the acceptance of *M. Barton* of that devise.

If the Court should be of opinion that the annuity was not extinguished, then the verdict was to stand for the defendant's arrears of 1200*l.*; but if the Court should be of opinion that the annuity was extinguished, then

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a second question arose, whether the defendants were justified in making the distress in respect of the annuity of 20*l.* granted to the Defendant, *M. Barton*, by the above recited will and codicils; and if the Court should be of that opinion, the verdict was still to stand for the Defendants, but the arrears were to be reduced to 120*l.* If the Court should be of a contrary opinion, the verdict entered for the Defendants was to be set aside, and a verdict entered for the Plaintiff, with 3*l.* damages.

This case was argued twice. In *Trinity* term by *J. Jervis* for the avowant, and *Lloyd* for the Plaintiff, and in *Michaelmas* term by *Taddy* Serjt. for the avowant, and *Lloyd* for the Plaintiff.

Arguments for the avowant. The 200*l.* annuity was not extinguished by the devise of a portion of the land on which it was charged. It is true, that if a party who has a rent-charge issuing out of land *purchase* any part of the land, the rent-charge is said by *Littleton* to be extinguished: *Lit. s. 222*. But the word *purchase*, though said by the text-writers to include all modes of acquisition except descent, could not have been used by *Littleton* in so wide a sense, but must rather have been applied to conveyances arising exclusively out of the spontaneous act of the party. A devise was not a mode of conveyance known at common law; and it transfers the estate partly by operation of law and partly by act of the party; for to some purposes the estate is in the devisee before acceptance. Now, in dower, the act of the widow concurs with the act of law, and yet the incidence of dower does not extinguish a rent-charge belonging to the widow; *Co. Lit. 150. a.*; the rent-charge shall be apportioned. And other instances are pointed out by Lord *Coke*, where the rent shall be apportioned, notwithstanding a part of the land come to the owner of the rent partly by his own act: *Co. Lit. 147. b. 148. a.*,

Bac. Abr. Rent, N. A devise is taken as a benevolence: *Vernon's case* (a): all the devisee does is to concur. The devise is not pleaded with an acceptance; it is complete unless the devisee refuses. In *Knight v. Calthorpe* (b) and *Slatter v. Buck* (c), the heir applied for relief against a jointress, under circumstances like the present, and was refused.

And this is not so much a rent-charge as a rent in lieu of dower. Lord *Coke* says a rent-charge is against common right, and must be strictly pursued; it is opposed to rent service; but a rent for jointure stands on the same footing as dower, which is favoured in law.

Secondly, it is clear that the devisor did not intend that this annuity should be extinguished. The devise is expressly given over and above what is provided by the settlement. The power of charging the land was, in its creation, subject to the wife's annuity: the testator devises under the power, and he could only charge subject to the power. The will is, in fact, only the execution of the power, and so, may be said to form part of the original deed: *Venables v. Morris*. (d)

At all events, the devise was a regrant of the annuity. Lord *Coke* says (*Co. Lit.* 147. b.), "If the grantee of a rent-charge purchase parcel of the land, and the grantor by deed reciting the said purchase of part, granteth that he may distreyne for the same rent in the residue of the land, this amounteth to a new grant, and the same rent shall be taken for the like rent, or the same in quantity. And so it is if a man by deed granteth a rent-charge out of his land to a man for life, and granteth further by the same deed that he and his heires may distreyne in the land for the same rent, this amounteth to a new grant of a rent in fee simple."

As to the annuity of 20*l.*, the objection of extinguish-

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(a) 4 *Rep.* 3.(b) 1 *Vern.* 347.(c) *Moseley*, 256.(d) 7 *T. R.* 347.

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ment does not arise, the charge being on property other than that devised to the wife.

Arguments for the Plaintiff. The devisee was a purchaser in the ordinary sense of the word. She was not bound to take possession, and by electing to take under the will she took by her own act, and not by operation of law.

As to the devisor's intention, it is immaterial what his intention was. The question is, what are the legal rights of the parties after the annuitant has taken as a purchaser, part of the lands charged. And the devise does not appear to have been made under the power in the marriage settlement; for that settlement contains a power to charge and a power to devise; the testator, in his will, recites the power to charge, and charges, but does not advert to the power to devise.

Nor can the devise be construed as a re-grant of the annuity for which the Defendants have avowed; that annuity is described in the avowry as an annuity charged on all the testator's lands, whereas the re-grant now set up is a grant of an annuity charged on all the testator's lands, *minus* that portion of them devised to the avowant.

With respect to the annuity for 20*l.*, it is a charge on the personalty and not on the land. By the power in the marriage settlement, the devisor had an alternative, either to charge the land, or raise 15,000*l.* in a gross sum: having adverted to that power, having directed his trustees to raise the annuity by mortgage, and having given no power of distress, he must be taken to have intended a charge on the personalty: *Marnell v. Blake.* (a)

In reply it was urged, that the language of the pleadings did not exclude the supposition of a re-grant, for the avowry set out the original deed of settlement; and

(a) 4 Dow. P. C. 248.

the will being the execution of the power given by the deed, operated upon all the lands the testator had at the time of its execution.

As to the annuity for 20*l.*, it was expressly charged on the land; the direction to mortgage was only by way of further security. Distress is incident to such a charge, whether expressed in the devise or not: *Buttery v. Robinson*. (a)

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Cur. adv. vult.

TINDAL C. J. The questions which have been argued in this case are two: one, whether *Mary Barton* the avowant, was seised of the annuity or yearly rent-charge of 200*l.* per annum for her life, at the time of the distress made; the other, whether she was seised of the annuity or yearly rent-charge of 20*l.*: both which questions are raised by traverses for that purpose, in the pleas in bar by the Plaintiff to the avowries.

As to the annuity or rent-charge of 200*l.*, the question is, whether it is extinguished by the devise to the grantee of the annuity of part of the land out of which such annuity or rent-charge issues, coupled with the acceptance of such devise. And we are of opinion that such is the necessary legal consequence to be drawn from the facts stated in the case.

By the settlement made in *May* 1775, the avowant, then the wife of Mr. *Pickering*, became seised for the term of her natural life of a rent-charge or annuity of 200*l.* per annum, issuing out of the manor of *Thelwall*, and the lands belonging to the same; and under the will of the settlor, who died within a year after the settlement made, she became entitled, for the term of her natural life, to the mansion-house at *Thelwall* and the lands occupied therewith, being part of the premises out

(a) 3 Bingham 392.

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of which the rent-charge issued, into which she entered after her husband's death.

The rule of law is laid down in *Lit. s. 222*. in these terms, "If a man hath a rent-charge to him and his heirs, issuing out of certain land, if he purchase any parcel of this to him and his heirs, all the rent-charge is extinct, and the annuity also, because the rent-charge cannot by such manner be apportioned." And the reason of this rule of law is very fully explained by Lord Chief Baron *Gilbert*, upon feudal principles. See his *Treatise on Rents*, p. 151.

On the part of the avowant it is contended, that the present case does not fall within the principle above laid down, upon several grounds. In the first place it is said, that this is not a *purchase* within the meaning of the term in the section above referred to. But when it is considered that *Littleton* has before, in sect. 13., defined purchase to be "the possession of lands and tenements that a man hath by his deed of agreement, into which possession he cometh not by title of descent from any of his ancestors or of his cousins, but by his own deed;" and when Lord Chief Justice *Coke*, in his commentary on that section, explains it to be "always intended by title, and most properly by some kind of conveyance, either for money or some other consideration, or *freely of gift*; for that is in law also a *purchase*," there is no ground for contending that a devisee, who enters and enjoys the subject-matter of the devise, can be any other than a purchaser within the meaning of the section first above referred to. And again, *Littleton* himself, in sect. 224., takes the express distinction between the case where the land comes to the grantee by his own act, and where by descent and by course of law; in which latter case the rent-charge shall be apportioned. And as to the cases cited by the avowant's counsel from 1 *Vern.* and from *Moseley's Reports*, they

were not cases where the heir or devisee of the land chose to stand upon the strict legal doctrine of extinguishment, but applied to the court of equity for aid and assistance against the jointress, which was refused by that Court.

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It is argued in the second place, that the devise of the land is expressly made over and above the rent-charge; and that such intention of the devisor ought to prevail; but the question before us is not a question of intention, but a question as to the strict legal rights of the parties under the circumstances of the case.

It is then argued, that the devise is made under a power given under the same settlement which creates the rent-charge, and it is urged that the case must be considered the same as if the provisions of the will made in execution of the power had been inserted in the settlement itself; in which case it is contended, that if the grant of the rent-charge, and the conveyance of part of the land out of which such rent-charge issues, had been by the same deed, no extinguishment could reasonably be supposed to take place. No authority is cited for this position; and even admitting the law to be correctly stated, upon reference to the will, the devise in question does not appear to be made under the power of appointment reserved to the settlor in the event of his dying without issue, but to take effect out of the ultimate remainder in fee limited to him by the settlement: for the power recited in the will is the power to charge, and not any power to appoint by deed or will; the charge on the estate is therefore made in execution of the power so recited, but the devise of the lands is not made under any power at all, but is a direct devise of the land itself.

It is urged lastly, that whatever may be the effect of the devise as to creating an extinguishment, yet, the will is in effect a re-grant of the rent-charge of 200*l.*, as

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it treats that rent-charge as still actually subsisting; for the devise of the rent-charge of 20*l.* is expressed to be "over and above what I have already settled upon her." But it is unnecessary to determine whether such construction of the will can be sustained or not; for if that construction be adopted, still the rent-charge of 200*l.* per annum cannot be supposed to issue out of those lands which by the will are expressly devised to the wife, but out of the residue of the lands from which it was made to issue in its original creation. It is not, therefore, the rent-charge described in the avowry, which is made to issue out of the manor and all the lands of *Thehwall*, for it issues out of the manor, and all the lands, with the exception of those devised to the widow of the testator.

As to the annuity of 200*l.* therefore, we think the issue upon the seisin of the rent-charge, as taken upon these pleadings, ought to be found for the Plaintiff.

As to the rent-charge of 20*l.* first devised by the will of *Thomas Pickering*, inasmuch as the devise is so worded as to make the rent issue out of all the lands, save and except those devised by the same will to the wife, it is free from the objection taken as to the rent charge of 200*l.* But the objection taken to the seisin of this rent-charge is, that although at first it is made a charge upon the realty, yet the proper construction of the codicils to the will is, to transfer it from the realty to the personal estate. We think, however, this is far from being clear; the construction of the will being quite compatible with the continuance of the rent-charge of 20*l.* per annum as a charge upon the land. Inasmuch, therefore, as the original charge on the land is clear, and the exemption of the land from this charge, and the transfer of it to the personalty is subject to considerable doubt and difficulty, we think it must be held still to continue a charge upon the land.

The result is, that we think judgment ought to be given for the Plaintiff, on the issue raised as to the seisin of the 200*l.* rent charge; but for the avowant, as to the rent charge for 20*l.* *per annum.*

Judgment accordingly.

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BEDFORD and Others, Assignees of DANIEL AUSTIN, a Bankrupt, v. BRUTTON and Others.

Nov. 25.

COVENANT. The Plaintiffs, as assignees of *Austin*, declared, that by an indenture of the 25th of *July*, 1827, between *Austin* of the one part, and the Defendants and *Henry Parry*, deceased, of the other, — after reciting that the Defendants and *Parry* on behalf of themselves and the other members of a society, called the *British Building Society*, had agreed with *Austin* to take on lease a parcel of ground described in the indenture, to build forty houses on, according to the stipulations therein-after contained, — *Austin* covenanted with the Defendants and *Parry*, that when the houses should be built to the approbation of *Austin*, he would, at the request of the other parties to the indenture, grant a lease of the land and erections to such persons as they or the major part of the members of the society, for the time being, should require, at certain rents therein specified; that in consideration of the premises the Defendants and *Parry* covenanted with *Austin* to pay him the rents until the leases should be granted: that by virtue of the indenture the Defendants and *Parry* entered into the premises; but before the leases were granted, or ought to have been granted, failed to pay the rents.

Plaintiff and Defendants were members of a joint stock company; Plaintiff agreed to demise land to Defendants as trustees for the company; Defendants covenanted to pay him rent; and by a separate deed, Plaintiff and the other members of the company covenanted to indemnify the Defendants for acts done by them as trustees:

Held, that Plaintiff, notwithstanding he was a member of the company,

might sue Defendants on their covenant.

2 S. R. G. R. 202

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which it appeared that there was a proviso for re-entry by *Austin*, in case the buildings were not finished by a certain specified time; and also that *Austin* should resume a portion of the land and make a corresponding abatement in the rents if forty shares in the society were not taken within a given period. They then pleaded that by another deed of the same date with the former, and made between the Defendants and *Parry* of the one part, and *Austin*, and the several other persons whose names and seals were thereto subscribed and set, of the other part, and also by certain articles of agreement (set out in the plea and referred to and confirmed by the deed), *Austin* and the several other persons mentioned in that deed, had formed themselves into a society called the *British Building Society*, for the purpose of erecting a number of houses, not exceeding forty, to be paid for out of a fund to be raised by the monthly subscriptions of the members: that *Austin* had agreed to demise the land on which the houses were to be built, at certain stipulated rents, to be paid at certain stipulated times; and that the agreement for the leases should be made to and executed by the trustees of the society in trust for the benefit of the members thereof, until the completion of the same: that the deed contained a covenant on the part of all the members of the society, that for the better indemnifying the trustees, each of the members would, when called upon at their general meetings, (to be held quarterly), do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in execution of the trusts.

The plea then averred, that the society in the indenture in the plea mentioned, and the society in the articles of agreement in the plea mentioned, were one and the same society; that *Austin* was, during all the time aforesaid, a member thereof; and that the Defend-

ants and *Parry* entered into and made the covenants in the declaration mentioned, by and on behalf of themselves and *Austin* and others, the members thereof as aforesaid, and for their use and benefit, and at their request and not otherwise.

In a second plea the Defendants alleged, that at the time of the making the indenture in the declaration mentioned, *Austin* was a member of the Building Society in the declaration mentioned, and held and was possessed of divers, to wit, four shares therein: that the Defendants made and entered into the several covenants therein contained by and on behalf of themselves and *Austin* and others the members thereof, and as trustees for themselves and *Austin* and the other persons as aforesaid, and not otherwise: and that *Austin* and the said other persons were jointly liable with the Defendants to pay the damages, if any, to be recovered by reason of the alleged breach of the said covenant in the declaration mentioned.

The last plea stated, that the Defendants and *Austin* were, amongst others, members and shareholders of the *British* Building Society in the declaration mentioned; that the Defendants were duly chosen and appointed trustees by and on behalf of *Austin* and the several other members of the said society; and that the Defendants executed the indenture in the declaration mentioned, as such trustees: that by a certain indenture made and entered into on the 25th of *July*, 1827, between the Defendants of the one part, and *Austin* and the several other persons whose names and seals were thereunto subscribed and set, of the other part, *Austin* did, for himself, his executors, administrators, and assigns, covenant, promise, declare, and agree, with and to the Defendants, their executors, administrators, and assigns, that, for the better protecting and indemnifying the trustees of the society from and against all costs, damages, and expences which they or any or either of them might be put to in and about the execution of the trusts thereby reposed in them,

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he would, when called upon at any of their general meetings, do and perform all such acts as might be necessary fully and completely to indemnify the said trustees from all loss or damage they might sustain or be put to in and about the execution of the said trusts. That the damages sought to be recovered by reason of the supposed breach of covenant in the declaration mentioned were incurred by them, if any, as such trustees as aforesaid within the true intent and meaning of the said indenture.

Upon demurrer by the Plaintiffs to the first of these pleas, and by the Defendants, to immaterial replications to the second and last,

R. V. Richards, for the Plaintiffs, argued that the pleas were ill. In order to determine whether one deed shall operate as a release of another, we must enquire whether the parties are the same; whether the damages to be recovered are the same; and whether it was the intention of the parties that the deed should so operate. 2 *Wms. Saund.* 47. *b. note*. Thus, where an obligee covenants not to sue at all, the obligor, in order to avoid circuity of action, may plead the covenant as a release. In *Lacy v. Killigrew and Kynaston* (a), a perpetual covenant not to take advantage of a covenant was held to operate as a release. *Gawden v. Draper* (b) and *Cage v. Acton* (c) establish the same principle. But in *Dean v. Newhall* (d) it was held, that an obligee might sue one of two joint and several obligors, notwithstanding a covenant not to sue the other. And in *Hutton v. Eyre* (e), a covenant not to sue one of two joint debtors was held not to discharge the other. *Solly v. Forbes* (g) is to the same effect. In *Rose v. Poulton* (h), one of the parties to a

(a) *Holt's Rep.* 178. 12 *Mod.*
548. 1 *Ld. Raym.* 688. 2 *Salk.*
575.

(b) 2 *Ventr.* 217.
(c) 12 *Mod.* 288.

(d) 8 *T. R.* 168.

(e) 6 *Taunt.* 289.

(g) 2 *B. & B.* 39.

(h) 2 *B. & Adol.* 822.

deed was both covenantor and covenantee; but upon his death, it was held, that the intent being clear, the surviving covenantees might sue on the deed; and *Parke J.* thought the action would have been maintainable in his life.

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Now, here the deed on which the action is brought was executed on the same day as the deed set up in answer by the Defendants, and it cannot be supposed that so soon after the execution of the first deed for the payment of rent till the houses should be built, the covenantee would release the Defendants before a single stone was laid. On the contrary, the main object of the second deed was to ensure the completion of the building, and make the first deed effectual.

Kelly for the Defendants. Upon the deeds set out on oyer, the Plaintiff cannot have the judgment of the Court. It is unnecessary to discuss whether or not the second deed operated as a defeasance or release of the first; for upon these pleadings it appears, that *Austin* was in partnership with the Defendants, and that this is in effect an action by one partner against another, to recover damages out of the partnership fund. The second deed is not pleaded as a release, but merely to shew the existence of the partnership: and whether it amounts to a release or not, the principle on which a covenant not to sue may be pleaded as a release, applies here. *Gibbs C. J.* says in *Hutton v. Eyre*, "the principle on which the covenant not to sue operates as a release is, to avoid circuity of action, but it goes no further:" and with a view to avoid such circuity, the Court, in that case, looked to the equitable situation of the parties. Here, if *Austin* or his assignees were to recover against the Defendants for rent, the Defendants would have a cross action against *Austin* for contribution under his covenant to indemnify them as trustees for the society.

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The parties to the two deeds are substantially the same; and so are the damages to be recovered; and even in *Rose v. Poulton* it was held, that if it had appeared the Plaintiff must himself have contributed to the damages, the action could not have been sustained. The effect of the two deeds here is, an engagement by a company, of whom the Plaintiff forms one, to pay him a rent for land let by him to the company; he is, therefore, at once suing himself, and seeking in an action at law to recover damages out of a partnership fund in which he is himself a partner. But one partner cannot sue a firm of which he is member. *Bosanquet v. Wray*. (a)

Again, the Defendants have a complete answer in a court of Equity; and in *Bottomley v. Brooke* (b), which was debt on bond, the defendant pleaded that the bond was given for securing 100*l.* lent to the defendant by one *E. Chancellor*, and was given by her direction to the plaintiff in trust for her; and that *E. Chancellor* before the action brought, was indebted to the defendant in more money than the amount of the bond: to that there was a demurrer, which was withdrawn by the advice of the Court. So that the Court there did not look to the person legally entitled, but to her who was beneficially interested in the bond. The authority of this case was afterwards recognised in *Rudge v. Birch* (c), where, to debt on bond, the defendant pleaded that the bond was given to the plaintiff in trust for *A.*, for a debt due from the defendant to *A.*, and that *A.*, at the time of exhibiting the plaintiff's bill, was indebted to the defendant in more money. The plaintiff demurred, and the Court, on the authority of the case of *Bottomley v. Brooke*, held that to be a good plea.

(a) 6 Taunt. 597.

(c) Cited in *Winch v. Keeley*,(b) Cited in *Winch v. Keeley*, 1 T. R. 621.

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The same principle was acted on in *Goddard v. Hodges*. (a)

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TINDAL C. J. The point raised upon the pleadings in the present action is this, that it appears from the first special plea, that the action is virtually and substantially an action of covenant, brought by the assignees of one partner, who has become bankrupt, against three of his partners, to recover damages against them, to which the Plaintiff himself must be contributory if he succeeds; and undoubtedly, if this account of the situation of the parties is correct, the action would not be maintainable at law. But upon looking at the deed upon which the action is brought, and the deed set out in the Defendant's plea, together with the articles referred to in the latter deed, and which may be considered as incorporated therein, we are of opinion there is no ground for the objection which has been made.

The deed upon which the declaration proceeds, contains a covenant under the seal of the three Defendants and one *Henry Parry*, since deceased, with *Austin* before his bankruptcy, that they would pay to *Austin* the several yearly rents in the indenture mentioned, until he, *Austin*, should grant the leases which he had covenanted by that deed to grant. Here, therefore, is an express covenant for payment of a certain sum under the seal of the Defendants, and it is unnecessary to observe that this forms the fit and proper ground of an action of covenant in a court of common law, unless sufficient matter is brought forwards in the plea to avoid it.

Now the substance of the first plea is this, that by another deed of the same date with the former, and

(a) 3 *Tyrr.* 209.

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made between the Defendants and *Parry* of the one part, and *Austin* and the several other persons whose names and seals were thereto subscribed and set of the other part, and also by certain articles of agreement set out in the plea, and referred to and confirmed by the deed, *Austin* and the several other persons mentioned in that deed had formed themselves into a society called the *British Building Society*, for the purpose of erecting a number of houses not exceeding forty, to be paid for out of a fund to be raised by the monthly subscriptions of the members; that *Austin* had agreed to demise the land, on which the houses were to be built, on certain stipulated rents, and that the agreement for the leases should be made to and executed by the trustees of the society in trust for the benefit of the members thereof, until the completion of the same. The deed set out in the plea then contains a covenant on the part of all the members of the society, that, for the better indemnifying the trustees, each of the members would, when called upon at their general meetings, do and perform all such acts as might be necessary for indemnifying the trustees from all loss and damage they might sustain in execution of the trusts.

The first observation that arises on this state of the pleadings is, that if we hold the action to be not maintainable, we defeat the very object and intention of the parties. The object was that *Austin*, who was an equal contributor to the common funds of the society by his monthly subscriptions, with the other members, and who, besides that contribution, gave up his land for the general purposes of the society, should receive an annual remuneration for the use of his land in the shape of rent, separate and distinct from his profits as a member of the society; and in order to avoid the difficulty of any direct agreement between himself and each of the other members, he covenants with the trustees to

grant the leases when the houses shall be finished, and they covenant with him, on the other hand, to pay certain annual sums in the meantime. Unless, therefore, some unanswerable objection can be brought forward against the maintenance of this action upon the covenant, the intention of the parties will be best effected by allowing it to be maintainable. It is objected that the damages recovered for the breach of covenant will be borne out of the common fund in which *Austin* is interested. The answer is, that the damages are, in the first instance, to be borne by the Defendants, who are to be indemnified at a future and uncertain time in such manner as the members of the society, at a general meeting, shall direct. The rent is reserved at certain stipulated times, — the meetings of the society are to be held quarterly. It never was intended that the landlord should wait till the quarterly meeting, when the day of payment occurred before it.

It is argued, that to avoid circuity of action, the present action is not maintainable; for if the Plaintiffs recover on the covenant made with *Austin*, the Defendants may recover back again from him the damages they have sustained. But this is not so; for each member has covenanted only to do what he shall be called upon to perform at a general meeting, in order to indemnify the trustees. The agreement, therefore, between *Austin* and the Defendants, differs from an agreement between partners in two important points,—the damages, when recovered by the Plaintiff, do not go to any partnership fund, but are his own separate property;—and the damages are not to be paid out of any partnership fund, but by the trustees on their personal contract.

The cases of *Rudge v. Birch*, and *Bottomly v. Brooke*, referred to by the Defendants' counsel, go no further than this, that the courts of law will so far take notice of the existence of a trust, as to let in against the plaintiff,

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1834. the trustee, that which would be a valid defence against the *cestuy que trust*. But those cases have never been extended; and they certainly furnish no authority for considering the *cestuy que trusts* the Defendants upon the record, where such a proceeding would defeat the whole object of the parties. And the case of *Andrews v. Ellison (a)*, is a strong authority to shew that this action is maintainable: there, in an action of covenant upon a policy under the seal of the defendants, it appeared upon the record, that the defendants were jointly interested with the plaintiff in the funds which were ultimately to satisfy the plaintiff's loss by fire; and it was held, that the defendants were liable on their express covenant that the plaintiff should be entitled to a remuneration out of the society's funds in case of loss by fire. Upon the whole, we think the present action maintainable, and give judgment for the Plaintiffs.

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Judgment for the Plaintiffs.

(a) 6 B. Moore, 199.

Nov. 6.

BLOUNT v. PEARMAN.

A lease contained a demise of two separate farms, with two *habendums* differing from each other; a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time: Held, that one *ad valorem* stamp for the amount of both rents was sufficient.

DEBT by lessor against lessee for a penalty incurred by a breach of covenant. A verdict having been found for the Plaintiff,

Ludlow Serjt. moved, upon leave given at the trial, to enter a nonsuit, on the ground that the lease con-

tained a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time: Held, that one *ad valorem* stamp for the amount of both rents was sufficient.

taining the covenant had no sufficient stamp, and, therefore, ought not to have been received in evidence.

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The lease contained a demise of two separate farms, with two *habendums*, differing from each other in duration; a reservation of two distinct rents — one in respect of each farm; and separate covenants, some applying to one farm and some to the other. The lessee entered on the whole at the same time. There was one *ad valorem* stamp, calculated upon the united amount of the two rents.

Ludlow contended that there should have been two stamps; one for each of the rents reserved, which would have yielded a larger amount of duty; or, at all events, the single stamp should have been for that larger amount. The lease contained in effect two demises; and if the higher rate of duty might thus be eluded, there would be no limit to the number of demises which might be contained in a single instrument, for the purpose of defrauding the revenue.

In *Boase v. Jackson* (a), where a single stamp was held sufficient upon a lease of a slate pit at B. and stone quarries at C., there was only one *habendum*; and in *Coster v. Cowling* (b), *Alderson J.* said the lease was held to be properly stamped, “because it appeared that possession could not be given of the stone quarries at the same time with the slate pit, nor till the time mentioned in the lease.”

TINDAL C. J. I am not able to say, with a sufficient degree of certainty, that the case of *Boase v. Jackson* has been wrongly decided; or, sufficiently to distinguish this case from that, to grant a rule for entering a nonsuit. This appears to me to be, virtually and substantially, one transaction: there is one landlord and one tenant;

(a) 3 B. & B. 185.

(b) 7 Bingham 456.

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the whole premises are demised together in one contract, at one and the same time. It is true, there are two rents reserved: one in respect of one part of the premises demised, another in respect of the other; and that the terms upon which these premises are granted, differ. But I think we should be interfering with many transactions which are perfectly fair in the ordinary case of landlord and tenant, if we were to grant the rule on that ground. It is no uncommon thing that different parts of premises should be entered upon at different periods of the year, — the arable land at one time, the meadow and pasture ground at another, and the buildings at a third; and the *habendum* is to have and to hold the arable from such a time to such a time, and the meadow from such to such time. But unless the parties mean that these should be separate transactions, one stamp must be deemed sufficient.

The rest of the Court concurring, a rule as to this point was

Refused.

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REGULA GENERALIS.

WHEREAS inconvenience hath arisen by reason of the attornies practising in this court not having made any entry of their admission as attornies, and of the taking out of their annual certificates in the book kept for that purpose by the clerk of the warrants :

AND WHEREAS, by the custom and rules of this court every attorney ought to pay to the clerk of the warrants or his deputy, his termage fees, being eight pence in every term, one moiety of which forms the fund for the support of the criers of this court :

AND WHEREAS complaint has been made to us, that of late such payments have been much neglected :

IT IS ORDERED, That every person admitted an attorney of this court, not having already entered such his admission, and also every attorney hereafter to be admitted, shall forthwith enter his admission, and shall cause his annual certificate to be on or before the first day of *Easter* term in every year, entered with the said clerk of the warrants, which entries shall in all cases where the annual certificate has been already entered in one of the courts, be made without fee or reward ; and shall at the same time pay and discharge all his arrears of termage fees.

N. C. TINDAL.

S. GASELEE.

S. VAUGHAN.

I. B. BOSANQUET.

END OF MICHAELMAS TERM.

NEW CASES

IN THE

1835.

COURT OF COMMON PLEAS,

AND

OTHER COURTS.

Hilary Term,

IN THE

FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were,

TINDAL C. J. VAUGHAN J.

PARK J. BOSANQUET J.

Jan. 13.

DABBS v. HUMPHRIES.

Sheriff's costs
upon inter-
pleader.

UNDER a *fi. fa.* against *Humphries*, the sheriff of *Sussex*, on the 25th of *February* 1834, seized, among other things, goods of *Firminger* and *Aylmore* in the house of *Humphries*, without any express instructions from *Dabbs*.

On the 7th of *May*, the sheriff, without recurring to *Dabbs*, applied to this court under the interpleader act; when an issue was directed between *Dabbs* on the one side, and *Firminger* and *Aylmore* on the other.

On the 23d of *May*, by the consent of all parties, the goods were sold under the *fi. fa.*, and the produce of them paid into court, to abide the order of the Court.

On the 7th of *July*, *Dabbs* abandoned all claim to the goods; and under the order of a judge, 116*l.* 2*s.* was paid out of court to *Firminger*, and 12*l.* to *Aylmore*, in respect of their several claims, leaving in court only the sum of 11*l.* 6*s.*

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Clarkson, on the part of the sheriff, obtained in *Trinity* term a rule, calling on *Dabbs*, *Firminger*, *Aylmore*, and *Humphries* to shew cause why this 11*l.* 6*s.* should not be paid out of court to the sheriff, towards covering the expenses incurred by the sheriff in the sale of *Humphries's* goods seized under the *fi. fa.*; and why the Plaintiff should not repay the sheriff the sum paid to the auctioneer for conducting that sale, together with 15*l.*, the expenses of keeping possession of the goods, and the sheriff's costs of the application on the 7th of *May* and on the present occasion.

Bompas Serjt. on the part of *Firminger* and *Aylmore*, contended that if the sheriff were entitled to any of these costs, he must seek them at the hand of *Dabbs*.

Barstow for *Dabbs* insisted, that under the circumstances of the case, the sheriff was entitled to no costs. He had taken the goods upon his own responsibility, in the discharge of his own duty, and without being prompted by *Dabbs*. He should have proceeded with more caution; and, at all events, should have applied to *Dabbs* for instructions, before he incurred the expense of coming to this Court.

Clarkson. *Dabbs* having allowed an issue to be raised in respect of goods to which he knew he had no claim, and having omitted to put in his disclaimer till two months after the rule of the 7th of *May*, ought at all

1835. events to pay the sheriff the expenses of sale and of keeping possession.

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TINDAL C. J. The justice of the case requires, that this rule should be made absolute for allowing the sheriff the costs of the sale, and of keeping possession from the 7th of *May* till the time of the sale. And under the circumstances of the case, those costs must come from the pocket of the Plaintiff. From the time of the application to this Court on the 7th of *May* to the time of the sale, the sheriff clearly became the agent of the Plaintiff, for the object of turning the goods in question into money, with a view to the payment of the Plaintiff's debt. The sheriff, also, and *Firminger* and *Aylmore*, are entitled to receive from him the costs of this application.

The rest of the Court concurred.

Rule absolute accordingly.

Jan. 14.

CRANCH v. WHITE.

R. being employed to procure a bill of exchange to be discounted for Plaintiff, instead of

doing so, indorsed it, and

placed it in the hands of Defendant, who was clerk to a creditor of *R.* Defendant carried the bill to *R.*'s account with his creditor, and though afterwards apprised of the circumstances under which *R.* held the bill, refused to restore it: Held, that Defendant was liable to Plaintiff in *trover*.

TROVER for a bill of exchange of 200*l.*, dated *July* 13th 1833, drawn by the Plaintiff on and accepted by *James Plimpton*, payable four months after date; and indorsed by the Plaintiff, by *Boym* and Co., and by *Roberts*.

The Defendant acted as clerk to his mother, who carried on the business of a coal-merchant. *Roberts*,

placed it in the hands of Defendant, who was clerk to a creditor of *R.* Defendant carried the bill to *R.*'s account with his creditor, and though afterwards apprised of the circumstances under which *R.* held the bill, refused to restore it: Held, that Defendant was liable to Plaintiff in *trover*.

1. H. & N. 119.
7 L.R. 23. 62

13. 2. 13. 5. 7 4 9.

who was employed by the Plaintiff to get the bill discounted, owed the Defendant's mother a considerable sum for coals, and instead of procuring the bill to be discounted, indorsed it, and placed it in the hands of the Defendant, who carried it to the credit of *Roberts's* account with his mother.

The Defendant was afterwards apprised that *Roberts* had only been employed to get the bill discounted, and was requested to give the bill up; but he refused to do so, saying, he had placed it to his mother's account.

The acceptor afterwards refused payment to the Defendant or his mother.

At the trial before *Tindal* C. J., a verdict was found for the Plaintiff, which

Atcherley Serjt. moved to set aside, on the ground that the action ought to have been brought against the mother of the Defendant, and not against the Defendant; that if the Plaintiff had declared in *assumpsit* on an alleged contract to discount the bill or to redeliver it, the action must have been against the mother the principal, and not against the Defendant, who was only her clerk, and known at the time to *Roberts* to be so; and that the Plaintiff by declaring in *trover* instead of *assumpsit*, could not vary the liability of the parties: *Powell v. Layton* (a), *Jennings v. Randall*. (b) Secondly, that the refusal to deliver up the bill, did not amount to evidence of *conversion* of the bill by the Defendant; for he had not the legal control over the bill, which was in his custody merely as clerk or agent, and not on his own account. If this bill had been paid by the acceptor, an action for money had and received would not have lain against the Defendant, it must have been brought against the mother. Thus in *Stephens v. Badcock* (c), an attorney

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(a) 2 N. R. 365. (b) 8 T. R. 335. (c) 3 B. & Adol. 354.

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who was accustomed to receive certain dues for the Plaintiff his client, went from home, leaving his clerk at the office. The clerk, in the absence of his master, received money on account of the above dues for the client (which he was authorised to do), and gave a receipt signed by the clerk for his master. The master was in bad circumstances when he left home, and never returned; but it did not appear that his intention so to act was known at the time of the payment to the clerk. The clerk afterwards refused to pay the money over to the client, and on *assumpsit* brought against him for money had and received, it was held, that the action did not lie; for that the defendant received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being answerable to the client for the sum received by the clerk.

In the present case there is no privity of contract between the Plaintiff and Defendant; and if the Defendant be not liable in *assumpsit*, neither is he in *trover*.

TINDAL C. J. Two objections have been made to the verdict in this cause, which has been given for the Plaintiff: first, that according to the facts proved at the trial, the action has been misconceived, and should have been *assumpsit* instead of *trover*; and, secondly, that even if *trover* lies, the action should have been brought against the Defendant's mother, for whose benefit the note was received.

With respect to the first objection, that the action should have been conceived in contract instead of *tort*, let us see what are the facts. The Defendant acted as clerk to his mother, who carried on the business of a coal-merchant: *Roberts*, who was employed by the Plaintiff to get the bill discounted, owed to the Defendant's mother a considerable sum for coals; and instead of procuring the bill to be discounted, indorsed it and

placed it in the hands of the Defendant, who carried it to the credit of *Roberts's* account with his mother. The Defendant was afterwards apprised that *Roberts* had only been employed to get the bill discounted, and was requested to give the bill up; but he refused to do so, saying he had placed it to his mother's account. The acceptor afterwards refused payment to the Defendant or his mother.

What evidence is there here of any contract on the part of the Defendant? But it is said that if the acceptor had paid the bill, the Defendant's mother would have been liable to the plaintiff in an action of *assumpsit* for money had and received; and that a plaintiff cannot, by changing the form of action, deprive a defendant of any advantage to which he is fairly entitled. I agree in the latter proposition. In *Powell v. Layton*, it was held, that to an action on the case in the form of *tort*, against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant might plead in abatement that the goods were delivered to him and his partners jointly, and that his partners were not sued. So in *Jennings v. Rundall*, it was held, that a plaintiff could not convert an action founded on a contract into a *tort*, so as to charge an infant defendant; and that, therefore, where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant maliciously intending, &c., wrongfully and injuriously rode the mare so that she was damaged, &c., the defendant might plead his infancy in bar, the action being founded on a contract.

Those two cases, however, do not decide that the form of action had, under the circumstances, been misconceived, and that the plaintiffs, as it is contended here, ought to have been nonsuited, but merely that the

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defendants were entitled to be let into the same defence as if the actions had proceeded on the contract. What difference would it have made to the Defendant in this action, — what better answer would he have had to the charge made against him, even if the Plaintiff had declared upon an implied contract to redeliver the bill?

Then, if the action be not misconceived in *trover*, has the Defendant been improperly sued instead of his mother? The general rule is, that in actions of *tort* all persons concerned in the wrong are liable to be charged as principals. In *Perkins v. Smith (a)*, it was held that *trover* lay against a servant who disposed of goods the property of another to his master's use, whether he had any authority or not from his master for so doing. It was objected that the action was improperly brought against the servant *Smith*, who acted wholly in that matter for his master, and that the conversion was found to be to the use of his master, which was the gist of an action of *trover*; — that applies to the point now under discussion; — and *Lee C. J.* said, “the point is, whether the defendant is not a *tort-feasor*, for if he is so, no authority that he can derive from his master can excuse him from being liable in this action.” To apply that doctrine here, the son standing in his mother's shop, cannot justify a wrong under any authority from his mother.

Next, it is said there was no evidence of any conversion. But a demand and refusal, when not met with any counter evidence, amounts to a conversion. *Lord Coke* says *(b)*, “That if *A.* brings an action against *B.* upon *trover* and conversion of plate, jewels, &c., and the defendant pleads not guilty, now it is good evidence *prima facie* to prove a conversion, that the plaintiff requested the defendant to deliver them, and he refused; and,

(a) 1 *Wils.* 328.(b) 10 *Rep.* 56.

therefore, it shall be presumed that he has converted them to his own use." Here the note was bailed to the Defendant, and his refusal to return it, on demand, was evidence whence the jury might find a conversion. So in 1 *Roll. Abr.* 5. l. 45. "Si home trove mes biens et conust eux destre mon biens, et jeo eux demand de luy, et il refuse et denie a eux deliverer a moy, ceo est un conversion en ley."

According, therefore, to the facts in evidence before the jury, I think this action was maintainable; that it was properly brought against the Defendant; and that any justification of his conduct as the agent of his mother falls to the ground on the authority of *Perkins v. Smith*, which has been confirmed in *Stevens v. Elwall*. (a)

PARK J. The effect of the decision in *Powell v. Layton* is only that the defendant shall not, by the mere form of action, be deprived of any just answer he has to the plaintiff's claim. And in all the cases adverted to by the Chief Justice, the circumstances were more favourable for the defendant than in the present action. In *Stephens v. Elwall*, *Le Blanc J.* was, at the trial, impressed with the notion which has now been advanced on behalf of the defendant, but he afterwards acknowledged he had been mistaken. And Lord *Ellenborough* said, "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance, and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion:" — Here the Defendant acted with full knowledge of the circumstances, and yet persisted in holding the note in discharge of *Roberts's* debt

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to his mother: — “ For a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority from another, who had himself no authority to dispose of it.”

That was a much harder case against the defendant than the present; but it has always been recognised as law, and was, with the preceding decisions, confirmed in *Alexander v. Southey*. (a)

VAUGHAN J. I think the rule ought to be refused. This is an action of *trover*, and all the requisites of such an action have been complied with. There can be no doubt that the note was the property of the Plaintiff, that it came into the hands of the Defendant, and that he refused to restore it, or apply it in the manner required by the owner. And as to his being a servant to his mother, if he has a knowledge of what was done, he is liable to the Plaintiff.

In *Stevens v. Badcock*, the clerk had received various sums from the plaintiff, and with the plaintiff's assent had carried them to his master's account, so that they could no longer be distinguished by any earmark, and the action was in *assumpsit*; but if it had been a bag of money, and he had refused to deliver it, it had been held in *trover* a conversion.

In *Saxby v. Wynne* (b), where *A.* deposited goods with *B.*, and then sold them to *C.*, and afterwards directed *B.* to deliver the goods to *D.*; it was held that *B.* was not guilty of a conversion in delivering them to *D.* But there, *A.* was the rightful owner when he deposited the goods with *B.*; whereas, in the present case, *Roberts* had never any right to indorse the bill to the Defendant.

(a) 5 B. & Ald. 247.

(b) *Starkie, Evid.* 842. (last edit.)

BOSANQUET J. Here there was a wrongful appropriation of the Plaintiff's property, with a knowledge on the part of the Defendant that the appropriation was wrongful, and that amounts to a conversion.

As to the form of action, assuming that an action on contract would lie, the only consequence would be, not to exonerate the Defendant, but merely to enable him to object to the non-joinder of his mother, as Defendant.

Rule refused.

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LAYTHOARP v. BRYANT.

Jan. 16.

THE declaration stated that the Plaintiff on the 3d December 1833, in London, by one Thomas Ross, his auctioneer and agent in that behalf, caused to be put up and exposed to sale by public auction a certain lease of a certain house, shop, and premises, for a certain unexpired term of twenty-five years from Lady-day then last, upon and subject to the following, amongst other conditions of sale: that is to say, that the purchaser should have and accept an assignment of the lease under which the vendor held the premises, — and which, agreeably to a clause in the lease, was to be furnished by the solicitor for the time being of the original ground landlord, at the purchaser's expense, on completing the purchase agreeably to the said conditions, — and *should not require the production of any title prior to such lease*: that the purchaser should pay into the hands of the Plaintiff put up to sale by auction a lease of premises, which he occupied as assignee of the lease, stipulating not to produce any title prior to the lease. In an action against a purchaser for not completing his purchase, in which action Plaintiff declared he was possessed of the lease, Held, the Defendant having rejected the abstract, that Plaintiff was bound to prove the execution of the lease by calling the attesting witness, and that it was not sufficient to prove the assignment to Plaintiff.

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auctioneer twenty-five per cent. in part of the purchase money; that if he should fail to comply with the conditions of sale, the deposit money should be forfeited to the vendor, who should be at liberty to proceed to another sale without notice to the purchaser; that whatever deficiency might arise, together with all charges attending the same, should immediately after such result, be made good by the defaulter; and in case of the nonpayment of the same, the whole should be recoverable by the vendor, as for liquidated damages, without the necessity of previously tendering an assignment to the purchaser. That, on the exposure to sale of the premises on the 3d of *December* 1833, at, &c. the Defendant became and was the highest bidder for, and then and there became, and was in due manner declared to be, the purchaser of the premises with the appurtenances as aforesaid, at and for a certain large sum of money, to wit, the sum of 441*l.*: and thereupon the Defendant afterwards, to wit, on, &c., at, &c., signed a memorandum of agreement in writing, that he had that day purchased the premises for the sum of 441*l.*, subject in every respect to the said conditions of sale. That the Defendant then and there, in consideration of the premises, and that the Plaintiff, at the special instance and request of the Defendant, had then and there undertaken and faithfully promised the Defendant to perform and fulfil all things in the said conditions of sale contained on the part of the vendor to be performed and fulfilled, undertook, and then and there faithfully promised the Plaintiff, to perform and fulfil every thing in the said conditions of sale on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled. That although the Plaintiff *was possessed of such lease as aforesaid*, for the said unexpired term in the conditions mentioned, and did afterwards, to wit, on, &c., at, &c., produce such lease to the Defendant, and

then and there requested the Defendant to accept an assignment thereof; and although the then solicitor for the original ground landlord was always from the time of such sale hitherto ready and willing to, and did afterwards, to wit, on, &c., at, &c., furnish and prepare an assignment of the said lease; and although the Plaintiff was always ready and willing to execute such assignment, and thereby to assign the said lease to the Defendant at the expense of the Defendant, on his paying the said purchase money according to the said terms and conditions of sale, to wit, at, &c.; and although the Plaintiff was always after the said sale ready and willing to perform the said conditions of sale in all things therein contained on his part to be performed and fulfilled; whereof the Defendant then and there had notice; yet the Defendant, not regarding the said terms and conditions of sale, nor his said agreement, or promise and undertaking, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the Plaintiff in that respect, did not nor would, although he was afterwards, to wit, on, &c., at, &c., requested so to do, accept such assignment of the said lease, or pay or cause to be paid to the Plaintiff the residue of the said purchase money, or any part thereof; but then and there wholly neglected and refused so to do, and then and there wholly refused then or at any other time to complete the said purchase. That thereupon the Plaintiff afterwards, to wit, on, &c. according to and by virtue of the said conditions of sale, again exposed the said tenements to sale by public auction, under and subject to certain terms and conditions of sale, and the same were then and there at such last-mentioned exposure to sale as aforesaid resold for a much less price or sum of money than the said price or sum for which the same had been so sold to the Defendant, to wit, for the sum

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of 194*l.* 5*s.*; whereby there then and there was a deficiency between the said price for which the tenements were so sold to and agreed to be purchased by the Defendant, and the said price for which the same were so sold on such resale, to a large amount, to wit, to the amount of 246*l.* 15*s.*; and the charges attending such resale as aforesaid, then and there amounted to a certain other large sum of money, to wit, the sum of 28*l.* 0*s.* 10*d.*; yet the Defendant, further disregarding the said conditions of sale, and his said promise and undertaking, had not, although he was afterwards, to wit, on, &c., at, &c., requested by the Plaintiff so to do, as yet paid the said sums of 246*l.* 15*s.* and 28*l.* 0*s.* 10*d.*, or either of them or any part thereof, but so to do had hitherto wholly refused, and still did refuse, to wit, at, &c.

The Defendant pleaded the general issue, on which issue was joined.

At the trial before *Park J.*, it appeared that the Defendant had purchased the premises for 441*l.*, at an auction, on the 3d of *December* 1833; that he signed a memorandum of the purchase, but being known to the auctioneer was not required to pay any deposit. On the 12th of *December*, the vendor's solicitor sent him an abstract of the vendor's title, when the Defendant, saying he had only bid at the vendor's request, refused to complete the purchase, and returned the abstract. An assignment of the lease, prepared by the solicitor of the ground landlord, was then sent to the Defendant; this he also returned, still refusing to complete the contract, but making no objection to the title.

The vendor thereupon sold the premises again for 194*l.* 5*s.*, and brought this action to recover the difference between that sum and 441*l.*, the price which the Defendant had agreed to pay.

The Plaintiff proved that he had himself occupied the

premises under an assignment of the original lease: the execution of this assignment he proved by an attesting witness, but no proof was offered of the execution of the lease itself, the Plaintiff relying on *Thompson v. Miles* (a), where, in an action for refusing to complete the purchase of a house with a right of way, it was held that the plaintiff should not be put to prove the execution of the deeds granting the right of way. But *Crosby v. Percy* (b) being cited in answer to this, the learned Judge directed a nonsuit, on the ground that proof of the due execution of the lease was essential to the Plaintiff's case.

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Bompas Serjt. having, pursuant to leave given at the trial, obtained a rule *nisi* to set aside this nonsuit and enter a verdict for the Plaintiff instead,

Wilde Serjt. and *Busby* shewed cause. The Plaintiff's occupation under the assignment was not sufficient to exonerate him from proving the execution of the lease of which he had averred himself to be in possession. Even the acknowledgment of the lessor that he had executed it, would not have dispensed with the regular proof of execution: *Johnson v. Mason*. (c) In *Vacher v. Cocks* (d), it was held that a party producing, at the trial of a cause, a deed which had been some months in his possession, was not excused from proving the execution because he received such deed from the adverse party, who formerly claimed a benefit under it. And in *Crosby v. Percy*, which is subsequent to *Thompson v. Miles*, it was held that an assignee of a lease, to shew his interest in the premises, was bound to prove the execution of the lease, and all the mesne assignments.

(a) 1 *Esp.* 184.(b) 1 *Campb.* 303.(c) 1 *Esp.* 89.(d) 1 *B. & Adol.* 145.

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Purvis v. Rayer (a) is also an authority that, in an action on the sale of a lease, the execution of the lease must be proved; and it may be inferred that the Plaintiff in this case contracted to give such proof, since he stipulates not to be called on to prove any title *prior* to the lease. The only exceptions to the strict rule as to the proof of deeds are where the instrument is more than thirty years old, and where, upon the requisition of one party, it is produced by his adversary, who takes an interest under it: *Pearce v. Hooper*. (b)

Bompas and Steer in support of the rule.

The question in *Purvis v. Rayer* was, whether the Plaintiff should produce, not whether he should prove the instrument in question. In *Thompson v. Miles*, Lord *Kenyon* said, "He would never allow it, that where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession had accompanied them;" he therefore admitted them without proof of the execution. And that case was not referred to in *Crosby v. Percy*; nor was *Nash v. Turner* (c), where it was held, that where there had been an assignment by deed, it was sufficient to prove the assignment by the subscribing witness, without calling the witness to the original deed; and Lord *Kenyon* said, "that it was sufficient to prove by the subscribing witness the execution of the assignment, for the assignment having adopted the original deed in all its parts, it became as one deed, and proof of it was therefore sufficient for the whole."

(a) 9 *Price*, 488.(b) 3 *Taunt.* 60.(c) 1 *Esp.* 217.

The authority of *Thompson v. Miles* is adopted in the treatises, as furnishing the true rule of practice. (a)

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TINDAL C. J. This case may be decided on the simple circumstances before the jury, without laying down any general rule as to the proof in cases of this kind, or militating against the doctrines laid down in any of the cases that have been cited.

Generally speaking, on occasion of purchases of this nature, an abstract is delivered, on which a correspondence or communication by word of mouth takes place; and in most cases, the question, if any arises, is on the law as it affects the title disclosed. Under such circumstances, a party having admitted the deeds to be authentic, and the legal effect of them as to title being the only matter in dispute, is not permitted to turn round at the trial and require proof of the genuineness of the deeds themselves.

In the present case, nothing has taken place but a bare delivery of the abstract; no correspondence or communication on points of title; nothing which shews an intention or has the legal effect on the part of the Defendant of admitting the genuineness of the deed.

The question, therefore, is, whether when the Defendant is called on to complete the purchase of a lease of which the Plaintiff declares himself to be in possession, the Plaintiff is not bound to substantiate that allegation by the ordinary mode of proof.

In actions on the sale of chattels, bare possession is, generally speaking, *primâ facie* evidence of property; but in the case of leasehold estates, the lease is only a symbol of possession; and according to the rules of our law the genuineness of that symbol must be established

(a) 2 *Phill. Evid.* 87. (2d edit.)

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in a particular way, namely, by calling the attesting witness to prove the due execution, unless the deed be of a certain age. If the Plaintiff fails to do that, he loses the very stepping-stone of his ground of action.

It would have been easy for the Plaintiff to have provided in the conditions of sale, that no such proof should be required; but as he has imposed no such condition, his case falls within the general rule which regulates the proof of deeds. To that rule there appear to be but two exceptions: one I have already adverted to; the other is, that where an adverse party produces, on notice, a deed under which he claims an interest it may be read in evidence against him, without proof of execution. Here the deed is not produced as evidence against the Plaintiff, but as the only evidence for him.

VAUGHAN J. My mind has fluctuated during the argument, but I think we may decide in this instance on the circumstances of the particular case, without reference to the decisions which have been cited on either side. No doubt there are great authorities both ways; *Magno se judice quisque tuetur*; Lord Kenyon having said, "he never would allow it, that where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds, deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession had accompanied them;" and *Mansfield* C. J. having held that the lease and all the *mesne* assignments must be proved.

But here the Plaintiff has failed to establish the first allegation in his declaration, the possession of a valid lease.

BOSANQUET J. This case is not without its difficulties, arising out of the decisions which have been referred to. But it is not necessary for us to decide the point discussed in those cases. The instrument which the Plaintiff here has failed to establish in proof is the foundation of his action — the very thing sold. In an action arising out of a sale, the Plaintiff must commence by shewing his possession of the thing sold. Here he has sold a lease; he ought, therefore, to have shewn, in the ordinary way, that he was possessed of the lease he proposed to sell. We do not say that where he holds the lease himself he is bound to prove all the *mesne* assignments; but he ought to shew that the lease is a valid subsisting instrument, that being the very subject of the sale. I think he ought to have shewn this independently of the conditions of sale, which appear to me to have only the effect of dispensing with the production of the landlord's title.

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PARK J. The cases which have been cited from *Espinasse* and *Campbell* are unsatisfactory, the circumstances under which they were decided not being fully stated. But when a party seeks to recover on the sale of a lease of which he avers himself to be in possession, if he fails to shew, in the usual way, that he is legally in possession of a valid instrument of demise, he fails to establish the very ground-work of his declaration, and must then submit to a nonsuit. And I confess, that in this case, I place considerable reliance on the language of the conditions of sale; production means legal production by legal proof; and when the Plaintiff stipulates that he shall not be called on to produce title prior to the lease, the inference is, that he consents to produce and prove the lease and title subsequent.

Rule for entering a verdict for the Plaintiff

Discharged.

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Bompas then prayed for a new trial on payment of costs, referring to *Atkinson v. Bell(a)*, where in an action for the price of goods bargained and sold, the Plaintiffs were nonsuited, on the ground that the Defendant never accepted the goods, and a rule for setting aside the nonsuit and entering a verdict for the Plaintiff was discharged: the Court, nevertheless, upon payment of costs, allowed the Plaintiffs to set aside the nonsuit, add to the declaration counts for not accepting the goods, and have a new trial.

TINDAL C. J. said the Court would consider the matter,—and, a few days after, acceded to the application.

(a) 8 B. & C. 277.

Jan. 17.

CARNE, Demandant; NICOLL, Tenant.

Statements of a deceased occupier, touching his title, are admissible in evidence generally, without reference to the particular effect they may produce in the cause.

UPON the trial at bar of this writ of right,

Merewether Serjt., on the part of the Demandant, was about to interrogate an aged witness as to expressions which had fallen from a deceased occupier of the premises in question, touching the party under whom he held them; the Demandant claiming title through that same party.

Wilde Serjt., for the tenant, objected to the evidence. Statements of a deceased occupier which shew that he was not seised of the freehold are received as admissions against his own interest, or to rebut the inference of adverse possession; but they are not evidence to shew the title of another.

TINDAL C. J. The expressions in question, which fell from a person in possession of the premises, and so as to cut down his own title, are clearly admissible in evidence: the effect of them, when admitted, is a different question.

Holloway v. Raikes (a) and *Peaceable v. Watson* (b), have decided the point.

(a) Cited in 2 T. R. 55.

(b) 4 Taunt. 16.

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Demandant;
NICKOLL,
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DUNCAN v. SUTTON and Others.

Jan. 19.

THE Defendant *Sutton* being in custody under a *ca. sa.* issued against him by the Plaintiff, became bankrupt on the 4th of *July*.

Upon the 7th, he was discharged out of custody, upon executing a warrant of attorney, with two sureties, for the amount indorsed on the *ca. sa.* Defeasance conditioned for payment the 7th of *October*.

At the same time one of the sureties, in the presence of all parties, consented that the Plaintiff should prove his debt under the commission, in order to lessen the sureties' liability; and this the Plaintiff did, on the 25th of *August*, at the request of the Defendant *Sutton*.

No payment having been made on the 7th of *October*, and no dividend being expected under the bankruptcy, the Plaintiff entered up judgment on the warrant of attorney, which

Defendant, after he had become bankrupt, was discharged out of custody on a *ca. sa.* upon executing a warrant of attorney with two sureties, the sureties consenting that the Plaintiff, in order to lessen their liability, should prove his debt under the commission.

Atcherley Serjt., on the part of the sureties, obtained a rule *nisi* to set aside, on the ground that the Plaintiff by dividend having been paid, the Court refused on summary application to exonerate the sureties.

The Plaintiff having proved his debt, but no

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electing to prove under the commission had exonerated the sureties.

Andrews Serjt. who shewed cause, contended, that the fifty-ninth section of 6 G. 4. c. 16., under which creditors of a bankrupt are put on election, applies only to demands arising prior to the bankruptcy; here, the demand arose on a warrant of attorney executed after the bankruptcy of *Sutton*. At all events, the proof having been made with the consent of the sureties, and in reduction of their liability, they were estopped from raising the objection. *Linging v. Comyn (a)*, which might be cited for the sureties, was a case of bail, and the judgment against the principal was signed before he became bankrupt.

Atcherley. The warrant of attorney having been given in respect of the claim under which the Defendant *Sutton* was in custody at the time of his bankruptcy, this is in effect a demand accruing prior to the bankruptcy; and the consent of the parties, if such consent was ever given, cannot defeat the express provision of an act of parliament.

The Plaintiff must be deemed to have taken the security subject to the provisions of the act; and the bankrupt, after proof against his estate, ought not to be liable to the same demand at the hand of his sureties.

TINDAL C. J. I have great doubt, whether this case comes at all within the act of parliament; which applies to demands occurring prior to the bankruptcy. This was a new undertaking after the bankruptcy; and though it was for the old debt, it cannot be said to constitute the same demand.

But even if it did so, the sureties having consented

(a) 2 Taunt. 246.

that the proof should be made in reduction of their liability, cannot now call upon the Court to interfere, in its discretion, upon a summary application. If they have any legal right, let them pursue it in the regular course.

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Rule discharged.

PHILLIPS v. BARLOW.

Jan. 20.

THIS was an action by the assignee of a bail-bond ; and a verdict having been obtained for the Plaintiff on an issue that the bond had not been duly assigned,

The assignment of a bail-bond must be executed in the presence of two witnesses, but it is not necessary that they should both subscribe their names in the presence of the officer assigning.

Martin moved for a new trial, on the ground that the assignment had not been sufficiently proved.

The statute 4 & 5 *Anne*, c. 16., prescribes that the sheriff shall assign the bond "by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses."

The sheriff indorsed this bond, and put his seal to it, in the presence of two persons: one of whom attested the indorsement by signing his name as subscribing witness at the same time; the other signed his name at a subsequent period, and when the sheriff was not present.

Martin contended that the intention of the legislature was not satisfied unless both the witnesses subscribed their name in the presence of the sheriff.

TINDAL C. J. I think, on the true construction of this statute, there is no ground for the objection that has been raised. All that is required is, that the sheriff

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shall assign the bail-bond to the plaintiff in the action, "by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses." That, he has done: he has indorsed the bail-bond, and has attested such indorsement by putting his seal to it in the presence of two credible witnesses. We are not to superadd to this that the witnesses shall both attest the indorsement in his presence. When the legislature has required such a course, it has been expressly enacted; as in the case of devises of land, which, according to the fifth section of the statute of frauds, must be signed by the party devising the same, or by some other person in his presence, and by his express directions, and be attested and subscribed in the presence of the devisor, by three or four credible witnesses. And this statute was passed only about twenty-six years before the statute of *Anne*. So that it may safely be inferred, that if it had been thought material the witnesses to the sheriff's indorsement should subscribe their names in his presence, such a mode of proceeding would have been expressly pointed out.

PARK J. It is observable, that in the statute of *Anne* the word *attested* is not applied in the ordinary sense to an attestation by a witness: the indorsement is to be attested by the hand and seal of the party indorsing.

The rest of the Court concurred.

Rule refused.

1835.

PRINCE v. BRUNATTE.

Jan. 21.

THE declaration stated, that one *Sarah Ellwood*, on the 23d of *July*, 1834, made her bill of exchange in writing, directed the same to the Defendant, and thereby required him to pay to the order of the said *Sarah Ellwood*, 17*l.* 10*s.* 10*d.*, one month after the date thereof, which period had now elapsed; that the Defendant then and there accepted the said bill; that the said *Sarah Ellwood* then and there indorsed the same to the Plaintiff; and that the Defendant then and there promised the Plaintiff to pay him the amount of the said bill, according to the tenor and effect thereof and of the said acceptance and indorsement.

Plea, That the said *Sarah Ellwood*, the supposed drawer, payee, and indorser of the said bill of exchange, before and at the time of the supposed drawing, acceptance, and indorsement thereof, was, and from thence hitherto hath been and still is, the wife of and married to a male person of the name of *Thomas Ellwood*, who then was, and from thence hitherto hath been, and still is, the husband of the said *Sarah Ellwood*; and that the husband of the said *Sarah Ellwood*, before and at the time of the said drawing, accepting, and indorsing of the said bill, and before and at the time of the commencement of this suit, was, and still is, living; and this the Defendant was ready to verify, &c.

Replication, That the said *Sarah Ellwood* at the time of her drawing and indorsing the said bill of exchange did draw and indorse the same as the agent and by the authority of the said *Thomas Ellwood*, her said husband; and that, the Plaintiff was ready to verify, &c.

To a declaration against the acceptor of a bill of exchange, alleged to have been drawn and indorsed by *Sarah Ellwood*, Defendant pleaded that she was the wife of *Thomas Ellwood*, who was still alive.

Replication, that she drew and indorsed the bill by the authority of her husband, Held, no departure.

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The causes assigned for demurrer were,

That a bill of exchange cannot be drawn and indorsed by a married woman unless she be the agent, or act under the authority, of her husband; that such agency or authority should be averred in the count, as it is an essential preliminary to the creation of any interest on which an indorsee can be entitled to sue; and the omission of such averment in the count cannot be supplied or remedied by averment in the replication, such averment in the replication being a departure from the count, in which the bill is alleged to have been drawn and indorsed by a person who appears to be a principal and not an agent.

Talfourd Serjt. in support of the demurrer. The indorsement of a married woman confers no title; *Barlow v. Bishop* (a); unless she acts with the authority of her husband; and though such authority has been presumed from the acceptor's promising to pay subsequently to the indorsement, *Cotes v. Davis* (b), no such subsequent promise is stated in this declaration. At all events, the replication is a departure from the declaration. The Plaintiff, after claiming on a bill drawn by *Sarah Ellwood*, as principal, cannot afterwards say that the bill was drawn by her as agent. He cannot say first that it was her bill, and then that it was her husband's. In *Prestwick v. Marshall* (c), where it was held that an indorsee might recover against the acceptor of a bill of exchange drawn and indorsed by a married woman with the consent of her husband, it appears, upon referring to the record, that there was a second

(a) 1 *East*, 432.

(b) 1 *Campb.* 484.

(c) 7 *Bingh.* 565.

count in the declaration, alleging the bill to have been drawn by the wife as agent of her husband.

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Comyn. The Defendant having accepted the bill as drawn by *Sarah Ellwood*, is estopped to dispute that it is *her* bill. By his acceptance he admits her authority to draw; and the Plaintiff may shew her authority to indorse. He might have shewn it under the general issue, upon a declaration like this, before the new rules of pleading were promulged — *Cotes v. Davis, Prestwick v. Marshall* — and the new rules permit him to put on the record what he might before have given in evidence. *Prestwick v. Marshall* was decided on the principle that, upon proof of the husband's consent, the indorsement of a wife communicates title to the indorsee; and neither the bar nor the Court adverted to the second count of the declaration.

Talfourd. The argument for the Plaintiff begs the whole question, which is, whether upon a declaration framed like the present, evidence of the wife's agency could have been given under the general issue.

The existence of the second count rendered it unnecessary to raise that question in *Prestwick v. Marshall*; and for aught that appears to the contrary the declaration in *Cotes v. Davis* might have averred the wife's agency.

TINDAL C. J. This is an action on a bill of exchange, which is stated, in the declaration, to have been drawn by one *Sarah Ellwood* upon, and accepted by, the Defendant, payable to the order of *Sarah Ellwood*, and by her indorsed to the Plaintiff.

The Defendant has pleaded that *Sarah Ellwood*, at the time of the drawing, acceptance, and indorsement of the bill, was the wife of *Thomas Ellwood*, who is still

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alive: to which the Plaintiff replies, that *Sarah Ellwood* drew and indorsed the bill as the agent, and by the authority, of her husband.

In this state of the pleadings it is contended on the part of the Defendant, that there has been a departure from the declaration. Undoubtedly, where a replication does not consist with or fortify the declaration, it is a departure in pleading; for a plaintiff is not entitled to declare in respect of one right, and then to set up another in his replication. The only question here, is, whether this replication does set up a title inconsistent with that disclosed in the declaration: and we think it contains nothing that falls within the objection of a departure. The declaration sets out a derivative title through *Sarah Ellwood* the drawer, and the title set out in the replication is equally derived from her. It is true, that she being a married woman, had no right to draw the bill without the authority of her husband; but the Defendant, after accepting the bill, is precluded from denying her authority to draw, and the replication alleges that she had the authority of her husband to indorse as well as to draw. Now, although Lord *Kenyon* said in *Barlow v. Bishop*, "That the delivery of the note to the wife, vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, he was not prepared to say that that would not have availed; as many acts of this nature may be done by a power of attorney, and the jury might have presumed what was necessary in favour of an authority from her husband for this purpose; but the indorsement being in her own name, it was quite impossible to say that she could pass away the interest of her husband by it;" it is clear, that if the husband had given an express authority, there would have been no occasion for the jury

to raise any presumption: and this case is distinguished from *Barlow v. Bishop*, by the circumstance that the wife had express authority to indorse. But *Cotes v. Davis* appears to tally exactly with the facts of the present case. There, the indorsee sued the maker of a promissory note for 24*l.* 17*s.*, payable to "Mrs. Carter, or order," and indorsed by her in the name of "M. Carter." At the trial it appeared, that when the note was presented for payment by a notary, with the indorsement upon it, the Defendant said, it should be paid in a few days; and that he afterwards asked for further time when the action was commenced, and the declaration had been delivered. The defendant offered to prove that Mrs. Carter, the payee, was the wife of a man of the name of *Cole*, who was still alive. Lord *Ellenborough* said, "the husband may authorise the wife to indorse bills of exchange or promissory notes, as his agent; and, after the acknowledgments and promises of the defendant in this case, it may reasonably be presumed against him, that Mrs. Carter had authority from her husband to indorse the note in question." And upon its being objected that the indorsement ought to have been in the name of the husband, Lord *Ellenborough* said, "we may fairly carry the presumption one step farther, and presume, that the husband authorised her to indorse notes in the name by which she herself passed in the world. The defendant is now estopped from contesting her authority for this indorsement." So that he puts the determination of that case on the presumption that the authority to indorse might be implied from the maker's promise to pay; here the authority to indorse is express. *Prestwick v. Marshall* was decided on the same principle, and not on any particular statement that might have been contained in the second count. The replication in this case, therefore, shewing, like the declaration, a title derived to the Plaintiff through

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Sarah Ellwood, there is no departure, and our judgment must be for the Plaintiff.

PARK J. I had some doubt at first, but I am now satisfied that this case falls within the principle of the decisions adverted to by his Lordship, particularly *Prestwick v. Marshall*. The authority of *Cotes v. Davis* has never been questioned, and is not to be distinguished from the present case, except in the circumstance, that the authority there was presumed, — here it is express. In *Prestwick v. Marshall* I said, and now repeat, “it is remarkable, that in *Cotes v. Davis*, the wife indorsed the bill in the name by which she was known to the world; and although in that case there was a subsequent promise, Lord *Ellenborough* refers to a presumed authority.”

VAUGHAN J. I am of the same opinion. At first, I thought there was a departure. But there is no foundation for the objection, because *Sarah Ellwood* is identified with her husband, and we cannot decide against the Plaintiff without overruling *Prestwick v. Marshall*.

Before the new rules, the Plaintiff would clearly have been entitled to recover under the circumstances disclosed on these pleadings, and those rules, which require the Plaintiff to plead what he would before have proved under the general issue, do not alter the principles on which he would be entitled to recover.

BOSANQUET J. I think this replication may be supported. It was not the object of the new rules to introduce any alteration in the material averments of a declaration, or to deprive a Defendant of any defence he might have resorted to before. If the Plaintiff, before the promulgation of those rules, would have been entitled, after designating a married woman as the

drawer of a bill, to shew under the general issue that she drew and indorsed it with the consent of her husband, he may now shew that fact in his replication. *Cotes v. Davis* is in point, and that case was confirmed on full discussion in *Prestwick v. Marshall*. And though the declaration in the latter case, now produced to us, contained a second count in which the wife was alleged to have drawn the bill as agent to her husband, that circumstance was not adverted to by the bar or the bench, but the case was decided expressly on the principle laid down in *Cotes v. Davis*.

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Judgment for Plaintiff.

MOORE v. STRONG.

Jan. 22.

DEBT for goods sold. The Defendant pleaded a set-off to a greater amount than the debt claimed; to which plea the Plaintiff replied the statute of limitations.

The goods in respect of which the Plaintiff sought to recover were sold to the Defendant in *June* 1830, and subsequently. The articles in respect of which the set off was claimed were all delivered to the Plaintiff in *October* 1825. There were no mutual accounts between the Plaintiff and Defendant till 1830.

The action was commenced in 1833.

The Plaintiff having proved the delivery of goods to the Defendant in 1830, the Defendant called a witness, whom he proposed to examine respecting a conversation which, at the time of the sale of the goods in 1830, passed between the Plaintiff and Defendant touching the debt due to the Defendant from the Plaintiff for the articles delivered in 1825.

A conversation at the time of a purchase, is admissible in evidence for the Defendant, in an action for the price of the goods, although it may let in a set-off otherwise barred by the statute of limitations.

An under-sheriff, before whom the cause was tried,

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rejected this evidence, on the ground that the set-off was barred by the statute of limitations.

A verdict having been given for the Plaintiff,

Cottingham obtained a rule *nisi* for a new trial on the ground that this evidence had been improperly rejected, the Defendant's set-off coming within the description of merchants' accounts, which are excepted from the operation of the statute of limitations.

Humfrey, who shewed cause, contended that merchants' accounts do not fall within the exception of the statute, unless they are mutual; *Cotes v. Harris* (a); and here there was no mutual account before 1830. In *Catling v. Skoulding* (b), and *Cranch v. Kirkman* (c), the accounts were mutual. But it is doubtful whether even those cases would have received the same decision if they had occurred after Lord *Tenterden's* act, 9 G. 4. At all events, the Defendant should have rejoined that these were merchants' accounts.

TINDAL C. J. I think this case may be determined without reference to the statute of limitations. The under-sheriff rejected a statement of what passed at the sale of the Plaintiff's goods to the Defendant in 1830, because it might indirectly have the effect of taking the Defendant's set-off out of the statute of limitations.

The Defendant had furnished the Plaintiff with goods in 1825; and the conversation at the time of the dealing in 1830 should have been received in evidence, as it might have shewn that the Plaintiff's goods were furnished by way of payment for the Defendant's, and so have barred the Plaintiff's action.

The rest of the Court concurring, the rule was made Absolute.

(a) *Bull. N. P.* 149.

(b) 6 *T. R.* 189.

(c) *Peake, N. P. C.* 164.

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COPPIN v. POTTER.

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WILDE Serjt. had obtained a rule *nisi* to exonerate the bail in this cause, on the ground of an alleged variance between the declaration and the affidavit to hold to bail; but, upon cause shewn, it appeared that the Defendant, on the 14th of *May* last, had withdrawn his plea and suffered judgment by default upon condition of obtaining a stay of execution till *July*; and that the bail, one of whom was the Defendant's attorney, had at the same time given their written consent that the delay conceded to the Defendant should not affect their liability for debt and costs: further than this, the bail, when sued on their recognisance previously to last *Michaelmas* term, pleaded a sham plea, and abstained from applying for relief till the present term: under these circumstances,

The Court will not exonerate bail for a variance between the declaration and affidavit of debt, where they have consented to a stay of execution, and apply late for relief.

The Court, without deciding the question of variance, held, that—looking to the consent given, after declaration, by bail, one of whom was the Defendant's attorney; the plea they had put in to the proceeding against themselves; and the time they had permitted to elapse,—the present application to the discretion of the Court came too late.

Rule discharged.

Talfourd Serjt. and *Robinson* shewed cause.

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Jan. 23.

ATKINSON v. BAYNTUN.

M. being in custody on execution pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, Defendant, in consideration that Plaintiff would discharge *M.* out of custody, undertook that he should, if necessary, be forthcoming for a second execution.

Held, that Defendant's was a valid contract.

THE declaration stated, that before the making of the memorandum of agreement and the promise of the Defendant hereinafter mentioned, certain persons, to wit, one *George Pearce Manley* and *Mary Manley*, on the 10th of *January* 1829, mortgaged certain premises to the Plaintiff for 8000*l.*, with a proviso for redemption on payment of the principal on the 10th of *January* 1834, and interest half-yearly in the mean time: that the said *G. P. M.* and *M. M.* covenanted to pay the Plaintiff interest, half yearly, at the rate of five per cent. per annum, and also to pay to *Michael Clayton* and *Alexander William Grant*, certain trustees in the deed of mortgage mentioned, or the survivor of them, their or his executors, administrators, or assigns, during such time as the said sum of 8000*l.*, or any part thereof, should remain unpaid, 5*l.* per cent. per annum, on the same sum of 8000*l.*, or on so much thereof as should from time to time remain unpaid, by even portions, half yearly, by way of a sinking fund, towards the liquidation of the principal: that for the further securing the said sum of 8000*l.* the said *G. P. M.* and *M. M.* executed a warrant of attorney, bearing date the day and year first aforesaid, to confess judgment forthwith for the sum of 16,000*l.*, which warrant of attorney was subject to a defeasance as follows:— That no execution should issue upon the said judgment until default should be made in payment of the said sum of 8000*l.*, or the interest thereof; or the annual sum to be paid to *Clayton* and *Grant*; but in case default should be made in any such payment as aforesaid, that it should be lawful for the Plaintiff, his executors,

administrators, or assigns at any time *from time to time* thereafter, to issue execution, or cause execution to be issued upon the said judgment, for the whole or any part or parts of the said sum of 8000*l.*, and the interest thereof, and all costs, charges, and expenses occasioned by the non-payment thereof, without the necessity of reviving the said judgment, notwithstanding there should have been no prior proceeding thereon, or no proceeding within one year immediately preceding the issuing of such execution :

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That, before the making of the memorandum of agreement and of the promise of the Defendant hereinafter mentioned, the Plaintiff caused judgment to be entered up upon the said warrant of attorney, against the said *G. P. M.* and *M. M.*, for the said sum of 16,000*l.*, together with his costs of suit, amounting to the further sum of 3*l.* 5*s.*: that afterwards and before the making of the memorandum of agreement and the promise of the Defendant hereinafter mentioned, the said *G. P. M.* and *M. M.* made default in the payment of the said annual sum of money so covenanted to be paid by them to the said *Clayton* and *Grant* as aforesaid ; and thereupon the Plaintiff for having execution upon the said judgment against the said *G. P. M.* and *M. M.*, for a certain sum of money, to wit, the sum of 802*l.* 2*s.*, afterwards and before the making of the memorandum of agreement and the promise of the Defendant hereinafter mentioned, sued and prosecuted out, &c. a certain writ, called a *testatum capias ad satisfaciendum*, founded on the said judgment so entered up under and by virtue of the said warrant of attorney as aforesaid, against the said *G. P. M.* and *M. M.*, directed to the sheriffs of the city of *Bristol*; by virtue of which said writ the sheriffs of the city of *Bristol* took and arrested the said *G. P. M.* and *M. M.*, and kept and detained them in custody until, and at, and after the time of the making

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of the memorandum of agreement and the promise of the Defendant hereinafter mentioned : of all which premises the Defendant afterwards and before the making of the memorandum of agreement and the promise of the Defendant hereinafter mentioned, had notice :

That thereupon, in consideration of the premises, on the 12th of *November* 1833, by a certain memorandum of agreement, in writing, then made between the Plaintiff and the Defendant, and then signed by the Defendant, it was agreed by and between the Plaintiff and the Defendant, that upon payment to the under-sheriff of the expenses of the execution under which the said *G. P. M.* and *M. M.* were then in custody, they the said *G. P. M.* and *M. M.* should be discharged ; the Defendant then engaging that they should be forthcoming at any future period within twelve months, in case it should appear to the Plaintiff to be necessary to issue another execution against the said *G. P. M.* and *M. M.* ; and the Defendant pledging himself on the part of the said *G. P. M.* and *M. M.* that they should without delay execute a deed of trust for sale, and that steps should be taken as soon as conveniently might be, to effect a sale of the mortgaged property : that the Defendant also agreed that the said *G. P. M.* and *M. M.* should pay or be charged with all proper costs and charges incurred by the sheriff of *Devonshire* and the Plaintiff, relative to an execution issued against them in the month of *March* then last :

That the said agreement being so made as aforesaid, to wit, on, &c. in consideration thereof, and that the Plaintiff at the special instance and request of the Defendant, had then promised the Defendant to perform and fulfil the said agreement in all things on the Plaintiff's part and behalf to be performed and fulfilled, the Defendant promised the Plaintiff to perform and fulfil the said agreement in all things on the

Defendant's part and behalf to be performed and fulfilled :

That although after the making of the said agreement, to wit, on, &c. the Plaintiff, confiding in the said promise of the Defendant, and in hopes of his faithful performance thereof, did suffer and permit the said *G. P. M.* and *M. M.* to be discharged out of the custody of the sheriffs; and the said *G. P. M.* and *M. M.* were then discharged out of the said custody accordingly; and although it afterwards, and before the commencement of this suit, and within the space of twelve months from the time of the making of the said memorandum of agreement and the said promise of the Defendant, appeared to the Plaintiff to be necessary to issue another execution against the said *G. P. M.* and *M. M.*, and although the Plaintiff did within such time as aforesaid, and after the 10th of *January* 1834, and before the commencement of this suit, issue another execution against the said *G. P. M.* and *M. M.* upon the said judgment so entered up as aforesaid, for a large sum of money, to wit, the sum of 7215*l.* 9*s.* 1*d.*, then remaining due from the said *G. P. M.* and *M. M.* to the Plaintiff upon the said indenture of mortgage, whereof the Defendant afterwards and before the commencement of this suit, on, &c. had notice; nevertheless the Defendant, not regarding the said memorandum of agreement or his said promise, did not at any time after the said last mentioned execution against the said *G. P. M.* and *M. M.* was issued, cause or procure the said *G. P. M.* and *M. M.*, or either of them, to be forthcoming, but wholly neglected and refused so to do: by reason whereof the Plaintiff was hindered and prevented from enforcing his said last-mentioned execution against the said *G. P. M.* and *M. M.*, or either of them, and was likely to lose the said sum of money so remaining due to him from the

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said *G. P. M.* and *M. M.* as last aforesaid upon the said indenture of mortgage, and all means of enforcing payment of the same: To the damage of the Plaintiff of 10,000*l.*, and therefore he brought his suit, &c.

Plea: that at the time of the suing and prosecuting of the writ of *testatum cupias ad satisfaciendum*, and also at the time of the taking and arresting of the said *G. P. M.* and *M. M.*, by virtue of the same writ, and also at the time of the making of the said supposed agreement and promise, as in the declaration was mentioned, the said sum of 8000*l.* was not, nor was any part thereof, nor was any interest upon the same, or upon any part thereof, due or payable from the said *G. P. M.* and *M. M.* to the Plaintiff; nor had any costs, charges, or expenses been occasioned by the non-payment thereof, &c.

Replication: that at the time of the suing out and prosecuting of the said writ of *testatum cupias ad satisfaciendum*, and also at the time of the taking and arresting of the said *G. P. M.* and *M. M.* by virtue of the same writ, and also at the time of the making of the said agreement and promise as in the declaration was mentioned, a certain sum of money, to wit, 800*l.* of lawful money, &c. for interest upon the said sum of 8000*l.*, and also in respect of the said annual payments so by the said indenture covenanted to be made, as in the declaration was mentioned, was due and payable from the said *G. P. M.* and *M. M.* to the Plaintiff; and that, the Plaintiff prayed might be inquired of by the country, &c.

General demurrer, and joinder.

Manning, for the Defendant, appeared in support of the demurrer; but the Court expressing an opinion against the sufficiency of the plea, he proceeded to impugn the declaration.

The declaration is bad upon three grounds. 1st, The

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particular stipulation contained in the agreement upon which this action is brought, is void,—as amounting to an undertaking to do that which it was legally impossible the Defendant should do. By the discharge of the *Manleys* out of execution, the judgment on which they had been taken was *satisfied*; and, therefore, any agreement that they should be forthcoming to answer another execution on the same judgment would be nugatory. In *Blackburn v. Stupart* (a) the defendant had been discharged out of custody under a *ca. sa.*, upon an agreement that the judgment should stand as a security for the payment of the residue of the debt in three months, when it was to be enforced by execution against his person and goods: after the three months the plaintiff issued a *ca. sa.* and took the defendant, who paid the residue of the debt in order to procure his discharge: the Court made a rule absolute, that the money, which was in the sheriff's hands, should be refunded to the defendant; and *Grose* Justice said, “that it would be very dangerous to permit the law to be unsettled in this respect; which is, that a person cannot be taken in execution twice on the same judgment, *whether he had so agreed or not*; and, therefore, though the defendant's conduct had been very scandalous, yet the rule must be made absolute.” In *Vigers v. Aldrich* (b), to debt on judgment, the defendant pleaded that he had been taken under a *ca. sa.*, and afterwards discharged out of custody by consent of the plaintiff, upon an agreement to pay certain sums at stipulated times. Upon demurrer, the Court held that the plaintiff could not bring an action upon the judgment after the defendant had been taken in execution and discharged by the plaintiff's own consent. *Da Costa v. Davis* (c), was an action on a bond given by

(a) 2 East, 243.

(c) 1 Bos. & Pull. 242.

(b) 4 Burr. 2482.

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the defendant to the plaintiff to procure the release of *May*, who was in execution at the plaintiff's suit. The condition was, that the defendant or *May* should pay 730*l.* on or before the 10th of *January* 1798, or that in case of default, *May* should be rendered on that day at a certain place, so that he might be again taken in execution. The Court was of opinion, on the authority of *Vigers v. Aldrich*, that the latter part of the condition was void, being to render a prisoner in execution who had once been discharged: and the plaintiff had judgment only on the ground that where the condition of a bond is to do one of two things, the shewing that one cannot be performed, is no reason for not having performed the other: but in the present case, the stipulations in the memorandum of agreement are cumulative, not alternative; and there is no ground for saying, that the Defendant has not performed every other branch of the agreement. In *Jaques v. Withy (a)*, *Ashhurst J.* says, "I know of only one case where a debtor, in execution, who has obtained his liberty, may afterwards be taken again for the same debt, and that is, where he has escaped. But the reason of that is, that he was not legally out of custody." To the same effect are *Tanner v. Hague (b)*; *Clarke v. Clement (c)*; *Whitacres v. Hamkinson (d)*; *Walker v. Alder (e)*; *Price v. Goodrick (g)*; *Dallam v. Price (h)*. And according to the principle established by those authorities, even the stipulation in the defeasance of the warrant of attorney, that execution should issue from time to time, does not supersede the rule of law that a party shall not be taken a second time under the

(a) 1 *T. R.* 557.(b) 7 *T. R.* 420.(c) 6 *T. R.* 525.(d) *Cro. Car.* 75.(e) *Style*, 117.(g) *Ibid.* 387.(h) 2 *B. M.* 235.

same judgment. [*Tindal* C. J. What do you say to executions under the stat. of *W. 3.*, for instalments or interest accruing after judgment?] They issue by express statutory enactment, which was rendered necessary by the strictness of the rule of law. But even under the stat. of 8 & 9 *W. 3. c. 11.*, if the Defendant being in execution for any instalment, were discharged out of custody *by the consent of the Plaintiff*, the whole judgment, or at all events the sum for which the Defendant was in execution, would be considered as satisfied. Here, though the declaration does not state how much the sheriffs of *Bristol* were commanded on the body of the writ to take the *Manleys* for, yet the Court will assume that the writ was in the usual form for 16,003*l. 5s.*, as the execution would otherwise be irregular in not pursuing the judgment. [*Tindal* C. J. The Court can make no presumption either the one way or the other.]

Again, the second execution is alleged to have issued for 7215*l. 9s. 1d.*; but it could never have been the intention of the Defendant to become responsible for more than the 802*l. 2s.* in respect of which he procured the *Manleys'* discharge; and for aught that appears to the contrary, the former sum of 802*l. 2s.* may form part of the 7215*l. 9s. 1d.*, which in the declaration is said to be the debt then remaining due. So that the *Manleys* would not only have been arrested a second time on the same judgment, but in respect of the same identical sum for which they had been in custody before.

Lastly, the declaration should have averred notice of the place or county to which the second execution was directed, for without such notice, the Defendant could not tell where to produce the *Manleys*. It is true that, upon an issue expressly on the point of notice, or upon a plea of *non assumpsit*, under the old law, the Court, *after verdict*, would presume that a sufficient

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notice had been proved. (a) But no such presumption arises upon demurrer. [*The Court* intimated that there was no weight in the two last objections.]

With respect to the plea, the Defendant by negotiating for the discharge of the *Manleys* from arrest, is not precluded from averring that the claim for which they were in custody was unfounded; because, if it were so, his own promise is, without a consideration. A promise made in consideration of the discharge of persons who are illegally imprisoned is not binding: as if one seeing a highwayman with a pistol at a traveller's breast, promises to pay 100*l.* for the release of the traveller: upon being sued for the amount, he may shew the circumstances attending the promise.

Wilde Serjt. The plea is ill. For even if the Plaintiff's claim against the *Manleys* were of a doubtful nature, their abandoning their security at the Defendant's request is a sufficient consideration to entitle them to enforce his undertaking: *Stracy v. Bank of England* (b); *Longridge v. Dorville*. (c)

And the declaration is sufficient; for it is plain that the second execution was not issued for the same portion of the debt as the first. The principal sum due being 8000*l.*, if the first execution issued for 802*l.* 2*s.*, the residue with the costs of the former execution would be about 7215*l.* And by express agreement, as under the defeasance of the *Manleys'* warrant of attorney, several and successive executions may issue for several instalments of the same debt, independently of the statute of 8 & 9 *W. 3.* For in *Austerbury v. Morgan* (d) it was held, that where judgment was entered on a warrant of attorney, though a bond also was given, it was not necessary

(a) *Vide* 1 *Mann. & Ryl.*
285. n.

(b) 6 *Bingh.* 754.

(c) 5 *B. & Ald.* 117.

(d) 2 *Taunt.* 195.

under 8 & 9 W. 3. to suggest breaches. *Cox v. Rodbard* (a), *Tilby v. Best* (b), and *Leveridge v. Forty* (c), support the same position. In *Vigers v. Aldrich*, *Jaques v. Withy*, and *Tanner v. Hague*, there was no agreement for a second execution. In *Blackburne v. Stupart* the first execution was for the entire debt; in *Da Costa v. Davis* there was no engagement by *May*, the debtor, to subject himself to a second execution. And in all the cases which have been cited for the Defendant the principle will be found to be laid down too broadly. These cases are founded upon a misapprehension of the true principle, which is, that where the Defendant is discharged out of execution by the consent of the Plaintiff, the law presumes that the Plaintiff has been satisfied by payment. Here the agreement of the debtor rebuts any such presumption.

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Manning in reply. The decisions which preclude a second execution by *ca. sa.* under the same judgment do not turn on the presumption of satisfaction, but on the principle that the Plaintiff, after having resorted to the highest species of satisfaction, the seizure of the Defendant's person, cannot resort to any other remedy, or to the same again, after he has released the Defendant. At common law, if the Defendant *died* in execution the judgment was satisfied, and the Plaintiff's remedy wholly gone. There, it would be impossible to presume actual satisfaction; yet the case of death and the case of a discharge with the assent of the creditor are both considered as equally standing upon the principle of legal satisfaction by imprisonment: *Foster v. Jackson* (d), *Linacre's case*. (e) It is true that, by

(a) 3 Taunt. 74.
(b) 16 East, 163.
(c) 1 M. & S. 706.

(d) Hob. 52.
(e) 1 Leon. 230.

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express agreement, several and successive executions may issue for instalments under the same judgment; but they must be executions by *fi. fa.* or *elegit*, or by *ca. sa.* after the two former; or if by *ca. sa.* in the first instance, the creditor must not consent to his debtor's discharge. No instance has been cited, in which a Defendant being in custody for one instalment the Plaintiff has consented to his discharge out of custody, and has retaken him either for the same or even for a subsequent instalment. This might have been done under the provisions of 41 G. 3. c. 64.; but those provisions were enacted only for three years, and have been suffered to expire, perhaps because they are inconsistent with the principle of law. As the Court appears to have overruled the objection to the *replication*, which raises the question as to the sufficiency of the consideration for the agreement, it is not intended to urge defect of consideration as an objection to the declaration: but the Defendant contends, that the Plaintiff complains of the non-performance of an undertaking to do that which was not only nugatory but illegal; for if the judgment was satisfied by the discharge of the *Manleys* from the first execution, the producing of the *Manleys* to the second execution, and the taking of them under that execution, would be an indictable offence, as well in the producer as in the taker.

TINDAL C. J. This question comes on upon a demurrer to the replication; but as we think the plea is bad in law, it is unnecessary to consider the replication. The declaration states facts from which it appears that a certain agreement, which is the subject-matter of the action, was made at the time when two persons of the name of *Manley* were in execution for the sum of money stated in the declaration. And the declaration proceeds to state, that in consideration that the Plaintiff would

permit the sheriffs of the city of *Bristol* to let those two persons go at large, the Defendant undertook that he would afterwards procure them to be forthcoming, if it became necessary that a second execution should issue.

The only answer suggested to that undertaking, by the plea, is, that no sum of money was due to the Plaintiff at the time the *Manleys* were taken: but the Defendant, by entering into an agreement to induce the Plaintiff to discharge the *Manleys*, admits that they were, at that time, really in execution, which, under the circumstances, is also an admission that the validity of the execution ought not to be disputed between the Plaintiff and Defendant: after the Defendant has obtained, for his friends, the benefit he proposed by their enlargement, he is estopped to object that the writ under which they were detained was not valid.

The Defendant then says, that the declaration is bad, as disclosing an agreement which is void in law. But upon looking at the statement in the declaration we see no necessity for coming to such a conclusion. The state of the case is, that on the 10th of *January* 1829 a mortgage was made, by two persons of the name of *Manley*, to the present Plaintiff, by which they assigned to him a certain leasehold property, the mortgage being redeemable on payment of 8000*l.* on or before the 10th of *January* 1834, with interest at 5 per cent. in the mean time. There was also a covenant on the part of the *Manleys*, the mortgagors, that they would create a sinking fund, at the rate of 5 per cent., during the intervening five years that the money was allowed to remain out on mortgage: which payments for the sinking fund and interest at 5 per cent., give, by an easy calculation, an amount of 400*l.* a year.

It was thought fit that these payments should be further assured by a warrant of attorney; and that warrant of attorney, after reciting the mortgage, pro-

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ceeds, in the defeasance, to state, that if, at any time, default should be made, either in the payment of the interest, or in the payment of the sums of money which were so stipulated to form a sinking fund between these parties, that *from time to time* it should be lawful for the Plaintiff to issue executions against the Defendants in that action, the two *Manleys*, until the whole was satisfied. Therefore the judgment entered up under that warrant of attorney for the sum of 16,000*l.* was a judgment entered upon an express understanding and agreement between the parties, that from time to time different executions should issue, until the whole sum of money that was made payable and secured by that instrument was actually received by the Plaintiff.

Then the declaration goes on to state, that it did become necessary that the Plaintiff should issue execution, and that such execution was issued, upon the judgment, “for a certain sum, to wit, the sum of 802*l.* 2*s.* ;” — not for the whole sum mentioned in the judgment.

Now that being the position of the parties, — the two *Manleys* being, at that time, actually in custody of the sheriffs of the city of *Bristol*, — then comes the agreement which is the subject of this action, by which the Defendant says, in effect, to the Plaintiff, “in consideration that you will release and discharge them out of the custody of the sheriffs, I will undertake, if it shall become necessary at any time that another execution shall issue, that these two persons shall be forthcoming;” and then the declaration proceeds to state, that it did become necessary that another execution should issue; and that at a long period subsequent, viz. at the end of *May* 1834, the Plaintiff did issue an execution for the sum of 7215*l.*

This state of facts, according to the argument for the

Defendant, amounts to an agreement that a debtor should be subject to a second execution for the same debt, and is, therefore, void in law. Admitting, for the sake of argument, that where there has been no engagement by the debtor to that effect, an agreement by a third party, that a debtor who has been already in custody for an entire debt shall be forthcoming for a second execution in respect of the same sum, would be a void agreement, still the present case does not, in law, or in fact, fall within such a principle.

There is no statement here from which we can infer that the debtor was to be charged a second time in respect of the same sum for which he had already been in custody. On the contrary, by pursuing the calculation suggested by the agreement, it appears that the second execution was for a sum and a subject-matter different from the original one. And the Defendant should not have left it in doubt, but, if such were the case, should have expressly averred that the second execution was for the same sum as the first. But it is sufficient for us to say, that it does not appear on this record that such was the case.

Supposing, however, that it was issued in respect of the same sum, or a part of the same sum, the Defendant has not given any answer to the cases in which it has been held that successive executions may, by agreement of the debtor, be issued for several portions of an entire debt: *Tilby v. Best*, *Leveridge v. Forty*, *Austerly v. Morgan*, and *Cox v. Rodbard*. Indeed, without the aid of authority, good sense would establish such a principle: and no authority has been cited to shew even that a second execution for the same debt is absolutely void: if it were so, the sheriff would be a trespasser, and no application to a Court would be necessary to discharge a Defendant. It has always been the practice, however, to make such an application. Now if such an execu-

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tion would not be void even where there has been no agreement to warrant it, why are we to say that it is void when it has been issued pursuant to the terms of an express agreement? at all events, the case where there is an agreement by the debtor for successive executions is essentially different from cases where there has been no such understanding. Our judgment, therefore, must be for the Plaintiff, and a jury must say what injury he has sustained by his debtors not being forthcoming at the proper time.

PARK J. His Lordship having gone so fully into the facts and circumstances of this case, it is unnecessary that I should take up much time in giving my opinion in concurrence with his. If it be taken, that in *Jaques v. Withy*, *Ashhurst J.* laid down the rule as generally as the counsel for the defendant has been inclined to state it to-day, *Buller J.* said, on the other hand, that he could not agree in the generality of the position laid down by *Ashhurst J.* There are various cases where the Court has declined to interpose, even where the second execution is for the same entire debt: as where there is any thing which looks like fraud. In *Baker v. Ridgway* the defendant, who had been taken in execution, became a bankrupt: it was necessary before the plaintiff could prove his debt under the commission to consent to the defendant's discharge: some time afterwards the commission was superseded, and the plaintiff took the defendant again: he applied to this Court to be discharged, and, according to the generality of the rule, he ought to have been discharged: I was inclined to that opinion, and so was the rest of the Court upon general principles; but they said that the rule does not apply if there be any suspicion of fraud in the case, and they doubted very much whether there were not circumstances of fraud sufficient to warrant the detention of the defendant, or, at least, to drive him to his

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audita querelâ: I did not feel upon the affidavits that were then produced that there was sufficient ground to warrant the judgment; but the Court would not discharge the defendant. But at all events the Defendant here, ought, on his pleadings, to have made it quite apparent that the second execution was for the same debt, — the same subject-matter. Now he has not done so, and it appears to us, upon taking the figures altogether, that it is not for the precise debt for which he had been arrested before. There was nothing illegal in an agreement to pay from time to time in the manner stated in the defeasance to this warrant of attorney. It was the duty of the Defendant to make it clear that the second execution was for the same sum, as much as if there had been an actual recaption, and the Defendant had come before a judge to be discharged on account of a second arrest. Not having done so, it appears to me to be clear that the Plaintiff is entitled to judgment.

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VAUGHAN J. I am of the same opinion. The cases which have been cited for the Defendant apply to a different state of facts; that is, where the body has been taken a second time for the same debt. I can perceive no illegality in a party's agreeing to pay a debt by instalments, and, with that view, to subject himself to successive executions; it is for the convenience of the party, and clearly in ease of a debtor. Here a third party has stepped in: after assenting to such an agreement he cannot be permitted to question the existence of the debt; and it is clear that the second execution was not in respect of the same sum as the first.

BOSANQUET J. I am of opinion that the judgment of the Court ought to be for the Plaintiff; but the question having been so fully discussed by my Lord Chief Justice,

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I shall only add a few words. I waive the point which has been raised for the Defendant, as to the liability of the *Manleys* to be taken a second time for the same debt: it is unnecessary also to consider the case of *Da Costa v. Davis*, which proceeded on the assumption that the debtor was not liable to be taken on the second execution for the same debt: but here I consider the Defendant liable under his own agreement to the Plaintiff's claim, because it does not appear on this record that the *Manleys* were taken in execution a second time for the same debt as on the first occasion. It was incumbent on the Defendant, in order to raise any appearance of an answer to the Plaintiff's claim, to shew that the two sums were the same. Not having done that, and it being compatible with the whole of his statement that the sums should be different, our judgment must be for the Plaintiff.

Judgment for the Plaintiff.

Jan. 24.

DAVY v. BROWN.

Where, upon a matter decided at chambers, a Judge has entertained the question of costs, an appeal to the Court on the subject of such costs ought not to be made.

THE Plaintiff's attorney, having signed judgment, was summoned before *Park J.* at chambers, to shew cause why it should not be set aside for irregularity, when, to avoid further contest, upon a suggestion from the judge, he consented to waive it. The Defendant's attorney then asked for the costs of setting aside the judgment, but the Plaintiff's attorney contending that his judgment, though strict, was regular, *Park J.* declined to make any order. Whereupon,

Miller obtained a rule calling on the Plaintiff's attorney to shew cause why he should not pay the costs

of setting aside the judgment, and of the present application.

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Wilde Serjt., who shewed cause, pointed out the inconvenience to suitors, if, after a judge at chambers had exercised his discretion on the point, a party should be permitted to come to this Court for a review of the decision, and create an expense of 8*l.* or 10*l.* to recover costs to the amount of a few shillings.

Miller, insisting that the judgment was irregular, and that the Plaintiff's attorney had admitted this by waiving it, contended that the Defendant was entitled to his costs; and that if a judge declined to grant them at chambers, the party had no remedy but to come to the Court.

TINDAL C. J. As this matter began before a judge at chambers, so it ought to have terminated there. There is no ground for an application to this Court. When the Plaintiff's attorney waived his judgment, the Defendant had obtained the object of his summons, and there the matter should have ended. However, costs being mentioned, the Plaintiff's attorney said, "Though I have waived the judgment, I still contend that it was regular;" upon which the judge declined to make any order as to costs. Common humanity requires that when such matters have been decided at chambers they should not be further questioned at such a heavy expense to the parties. The rule must be discharged with costs.

PARK J. Few judges at chambers will entertain the question of costs (a); but when the point has been

(a) As to the power of a Judge at chambers to order costs, see *Read v. Lee*, 2 B. & Ad. 415., where a rule nisi for discharging such an order was made absolute. That case,

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considered, and a decision pronounced, it is too bad for a party to come here at an expense of 8*l.* or 10*l.* to demand 13*s.* 4*d.* costs.

VAUGHAN and BOSANQUET Js. concurred.

Rule discharged with costs.

however, was re-considered in *Doe dem. Prescott v. Roe*, 9 *Bingh.* 104. In the latter case, and in the more recent one of *Hughes v. Brand*, 2 *Dowl. Pr. Rep.* 131., this Court and the Court of Exchequer acted on the principle that a Judge at chambers has the power to order costs. In *Hughes v. Brand*, it was intimated by *Bayley B.* that since

the Uniformity of Process Act, in consequence of which "a great deal of new business is now thrown upon the Judges at chambers," there are many cases in which this power should be exercised; *e.g.* "where a declaration is in vacation and irregular," he asks, "Cannot an application be made to a Judge to set it aside with costs?"

Jan. 24.

ABBOTT and Others, Assignees of BAKER, a
Bankrupt, v. POMFRET and Others.

Defendants,
B.'s bankers,
had discounted
for *B.* a
bill payable
Jan. 10th,
drawn by *B.*,
and guaranteed by *L.*

On the 3d
of Jan., *B.*,
being in em-

barrassed circumstances, gave *L.* a cheque on Defendants for the amount of the bill: the Defendants on receiving the cheque handed the bill over to *L.*—*B.* became bankrupt Jan. 9th:

Held, that his assignees could not sue Defendants as having received the amount of the cheque by way of fraudulent preference.

THE Plaintiffs, by this action for money had and received to their use as assignees of *Baker*, sought to recover 200*l.*, which they alleged to have been paid to the Defendants by *Baker* the bankrupt, in the way of fraudulent preference.

The facts were as follows:—One *Lawrence*, a friend of *Baker*, in order to assist him in his difficulties, had accepted a bill drawn by him for 184*l.*; *Lawrence* had

gave *L.* a cheque on Defendants for the amount of the bill: the Defendants on receiving the cheque handed the bill over to *L.*—*B.* became bankrupt Jan. 9th:

also, for the same purpose, guaranteed the payment of a bill for 200*l.*, drawn by *Baker* and accepted by one *Mills*.

These bills, which were payable on the 8th and 10th of *January* 1834, were in the possession of the Defendants, who had discounted them for *Baker*.

The Defendants were *Baker's* bankers. *Baker* was arrested on the 2d of *January*; and being in embarrassed circumstances, but having placed in the Defendants' hands enough to cover these two bills, went to the Defendants on the 3d of *January* 1834, accompanied by *Lawrence*, to whom he gave two cheques on the Defendants, one for 184*l.* 2*s.* 4*d.*, the other for 200*l.* *Lawrence* presented the cheques, and with the amount took up the two bills.

Baker became bankrupt on the 9th of *January* 1834.

The Plaintiffs thereupon sued *Lawrence* for the 384*l.* 2*s.* 4*d.*, as having been paid to him by way of fraudulent preference; but recovered only 184*l.* 2*s.* 4*d.*, the amount of the bill for which he was liable as acceptor, *Littledale J.*, who tried the cause, thinking, on the authority of *Guthrie v. Crossley* (a), that there was no fraudulent preference of *Lawrence* in respect of the 200*l.* bill, for which he was only a surety. Whereupon

The Plaintiffs now sought to recover the amount of that bill from the Defendants.

However, there was a nonsuit at the trial, on the ground that the Defendants were primarily creditors of *Mills* in respect of this bill, having made it their own by discounting it, and that therefore no fraudulent preference of a creditor of *Baker's* had been established.

Spankie Serjt. having obtained a rule *nisi* for a new trial,

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Wilde Serjt., Thesiger, and Channell shewed cause. After much contest as to the question of fact, whether or not *Baker* contemplated bankruptcy when the transactions of the 3d of *January* 1834 occurred, upon which the Court pronounced no opinion, they contended that, at all events, the Defendants were creditors of *Mills* and *Lawrence* in respect of this bill; and that having received the amount of it from *Lawrence*, who was ultimately liable, they were not, within the meaning of the bankrupt act, parties who had obtained a fraudulent preference from *Baker*.

Spankie and *Platt* in support of the rule. A preference of a particular creditor having clearly been intended by *Baker*, the person who obtains the benefit, and retains the money, must be esteemed the party preferred within the meaning of the statute. The object of the statute was to prevent the fund for the creditors being robbed, no matter by whom, and the assignees are entitled to recover the money in whose hands soever it may be found. It is no matter that the bankrupt intended to prefer *A.*; if the preference lights on *B.*, *B.* must take the consequences. If it were otherwise, the law against fraudulent preferences might always be defeated by the employment of an intermediate receiver.

TINDAL C. J. The argument for the Plaintiffs has taken the same course as if this had been a payment after the act of bankruptcy; for it has been contended, that whoever receives money from a trader under embarrassment, and likely to become bankrupt, is liable to be sued as having obtained, by a fraudulent preference, property which belongs to the assignees. The property, however, which the Plaintiffs seek to recover never passed to the assignees; and the sole condition on which

this action can be maintained is, that there has been a fraudulent preference of the Defendants in contemplation of bankruptcy. But this is the first time we have heard of a fraudulent preference of one, accompanied by payment to another. A fraudulent preference, in general, proceeds from motives arising from consanguinity, or friendship, or other reasons inducing a payment to a particular creditor, in derogation of the rights of the general body of claimants. But it is contended here, that if the preference be for *A.*, and the money finds its way to the hands of *B.*, the assignees may sue *B.* That would be carrying the doctrine of fraudulent preference to an alarming extent. The question, therefore, is, whether there is any evidence here that *Baker* intended a fraudulent preference of the Defendants. And it seems to me that no such evidence exists. *Baker*, having procured his bankers to discount two bills, one for 184*l.* 2*s.* 4*d.*, the other for 200*l.*, both payable early in *January*, pays into his bankers enough, with a sum which was previously there, to defray both bills. He then goes to the bankers with *Lawrence*, who having accepted one of the bills, and having guaranteed the payment of the other, was immediately liable on the one, and collaterally on the other. If *Baker* were in danger of becoming bankrupt, it is natural he should wish to assist *Lawrence*, who was his friend, by enabling him to take up the bills about to become due: he had a motive for preferring *Lawrence*, none for preferring the Defendants. That being so, he gives *Lawrence* a cheque, which *Lawrence*, on receiving the bills, hands over to the Defendants. There is no reason, therefore, for thinking that *Baker* meant to prefer the Defendants, and there is a reason for thinking he meant to prefer *Lawrence*. And the Plaintiffs themselves have put this construction on his conduct, for they have sued *Lawrence*, and have recovered in respect of one of the bills.

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I think, therefore, that the nonsuit was right, and that this rule must be discharged.

PARK J. It is a strong fact that the Plaintiffs themselves never looked to the Defendants till the action against *Lawrence* failed as to one part of their case. I think the rule ought to be discharged.

VAUGHAN J. I am of the same opinion. The Plaintiffs have been nonsuited on the ground that they failed in proving all that is requisite for the support of an action of this sort: that the trader was in insolvent circumstances; that he contemplated bankruptcy, and that he fraudulently preferred the Defendants. The question here is, whether the money passed to the Defendants by way of fraudulent preference. We are not called on to say whether *Lawrence* was the person preferred, although it is probable that such was the case: but no motive can be suggested which should have induced *Baker* to prefer the Defendants, and, therefore, the nonsuit ought to stand.

BOSANQUET J. I can see no sufficient ground for disturbing this nonsuit. The money having been paid in the course of business before the act of bankruptcy, the Defendants are *prima facie* entitled to retain it, and it is incumbent on the other side to make out that there has been a fraudulent preference. This, however, is not a case of that description. The Defendants had discounted bills for *Baker*, and *Baker*, contemplating bankruptcy, pays into their hands a sum sufficient to enable *Lawrence*, to whom he had given a cheque for

the amount, to purchase the bills which were then in the possession and the property of the Defendants. *Lawrence* presents the cheque and receives the bills. For whose benefit? undoubtedly for his own; since he was liable immediately on one of the bills, and ultimately on the other. *Baker*, therefore, had no intention to prefer the Defendants, who are entitled to retain the sum they have received upon the sale of their own bills.

Rule discharged.

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WOODS v. POPE.

Jan. 26.

THE Plaintiff sought, by this action, to recover against the Defendant—who had been tenant from year to year, of premises belonging to the Plaintiff,—a sum due for rent; a sum paid for certain repairs for which the Defendant was liable as such tenant; and 41*l.* 5*s.* damages occasioned to the Plaintiff by his inability to let the premises from *Lady-day* 1834 to the 15th of *August* following, in consequence of the state of dilapidation in which the Defendant had quitted them at *Lady-day*.

The Defendant paid into Court the sums claimed for rent and repairs; and it appearing at the trial, before *Gaselee J.*, that the Plaintiff had been occupied six weeks in repairing the house, the jury gave a verdict, on the third demand, for 13*l.* 10*s.*, notwithstanding the substantial repairs of the premises were to be done by the Plaintiff.

Plaintiff having recovered a verdict under 20*l.* as damages for his inability to let a house for six weeks, in consequence of Defendant having omitted to do certain repairs to which he was liable as tenant, the Court refused to disturb the verdict, notwithstanding the substantial repairs were to be done by Plaintiff.

Humfrey, by leave of the learned Judge who presided at the trial, now moved to set aside this verdict, and enter a nonsuit, on the ground that the Plaintiff, having recovered the sum expended on the repairs

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which the Defendant was liable to perform, could not, in addition, make any demand in respect of the premises having remained for a time unoccupied; and the less, as the Plaintiff himself was bound to do the substantial repairs.

TINDAL C. J. Unless this is a verdict against law we ought not to interfere, the sum recovered being less than 20*l.*, and I cannot see that it is clearly against law. The amount for which the Defendant was liable, in respect of the repairs he was bound to perform, having been paid into Court, the only question the jury had to consider was, what time it would occupy the Plaintiff to lay out that money. If the Defendant had laid out that money before he quitted the premises, the Plaintiff might have occupied them himself; the delay, therefore, was a consequential injury: it would take the Plaintiff *some* time to effect the repairs, which ought to have been done by the Defendant; and if there were *any* fact to go to the jury, we ought not to disturb the verdict.

The only answer has been, that the Plaintiff was bound to do the greater part of the repairs: but he might have consented to occupy the premises himself if the Defendant had completed his portion of the repairs, although further repairs might be requisite before the premises could be let to a tenant. I think, therefore, that this verdict is not so clearly against law as to authorise us to disturb it, the amount being under 20*l.*

The rest of the Court concurred.

Rule refused.

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BRAMAH and Another v. E. M. ROBERTS, L. ROBERTS, CLARE, BAKER, J. FOSTER, H. FOSTER, LYALL, and BLAKSLEY.

Jan. 21.

THE declaration stated that one *Wm. Clare*, on the 22d of *October* 1833, made his bill of exchange in writing, and thereby required the Defendants to pay to the order of him, *W. Clare*, 500*l.* three months after the date thereof, which period had now elapsed: that the Defendants then accepted the said bill, and *W. Clare* then indorsed the same to the Plaintiffs: of all which the Defendants then had due notice, and then promised the Plaintiffs to pay them the amount of the bill according to the tenor and effect thereof, and of the Defendants acceptance thereof: yet they disregarded their promise, and did not, nor did any or either of them pay.

The Defendants *Baker*, *J. Foster*, *G. H. Foster*, *Lyall*, and *Blaksley* pleaded, first, the general issue;—secondly, that there was not, at any time, any consideration or value for the Defendants accepting the said bill of exchange, or paying the amount thereof, or any part thereof: that the said bill, indorsed by *W. Clare*, was afterwards, to wit, on the 4th of *January* 1834, delivered on behalf of the Defendants to one *Thomas Hunt*, for a special purpose only, to wit, that the said *T. Hunt* should keep and take care of the said bill, for and on behalf of the Defendants, and for their use and benefit, and not for the purpose of being negotiated or delivered over by him to any other person or persons whatsoever: that the said *T. Hunt* then took and received, and from thence until the Plaintiffs became possessed of the same as thereafter mentioned, held the

To a plea by the acceptor of a bill of exchange, that it was, to the knowledge of the holder, negotiated by fraud, and that no consideration was given for the indorsement to the holder, it is sufficient for the holder to reply generally, that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration.

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said bill for the special purpose aforesaid: that the said *T. Hunt*, in violation of good faith, and contrary to the said special purpose for which he so received and held the said bill as aforesaid, heretofore, and whilst he held and had the same in his possession for the special purpose aforesaid, to wit, on the day and year last aforesaid, fraudulently, and without the authority of the Defendants, and with intent to defraud the said Defendants in the introductory part of the first plea named, negotiated and parted with the said bill for his own use and benefit, and then delivered the said bill so indorsed as aforesaid to the Plaintiffs: that the said bill was not, at any time, indorsed to the Plaintiffs otherwise than by the said *T. Hunt* so delivering the same, so indorsed by the said *W. Clare* as aforesaid, to the Plaintiffs: that the Plaintiffs, at the time when the said bill was so delivered to them as aforesaid, by the said *T. Hunt* as aforesaid, had notice of the premises, and well knew that the said *T. Hunt* had no power or authority to negotiate or part with the same on his own account; and that there was not, at any time, any consideration or value given in good faith for the said indorsement of the said bill of exchange to the Plaintiffs, as in the said declaration mentioned.—Thirdly, that the said bill never was accepted by the Defendants, except by the said *E. M. Roberts*, for and on account of himself and all the other Defendants in this action mentioned, under and by virtue of an authority from the last-mentioned Defendants, to the said *E. M. Roberts*, to accept bills of exchange on behalf of himself and the other Defendants for particular purposes only, that is to say, for the purposes of discharging claims against certain persons composing a certain company, called the South Metropolitan Gas Light and Coke Company, or upon the said *E. M. Roberts* and the other Defendants, as directors of the said company; but that the said *E. M.*

Roberts, on the 22d of *October* 1833, in breach of good faith, fraudulently and wrongfully, and without the consent or authority of the Defendants in the introductory part of the first plea named, and with intent to defraud them, accepted the said bill on behalf of himself and all the other Defendants in this action, not on account of any of the purposes for which he was so authorized to accept bills on behalf of himself and the other Defendants as aforesaid, but for another and different purpose, to wit, for the private purposes of the Defendant *W. Clare*, (who drew the same, and who then had no claim or demand whatever on the other Defendants,) and of himself the said *E. M. Roberts*, and the Defendant *L. Roberts*. And that the Defendants, in the introductory part of the first plea named, received no consideration or value for the said acceptance.

The Plaintiffs replied to the second plea, — that after the making of the said bill, and before the same had become due and payable, to wit, on the 4th of *January* 1834, the said bill was indorsed and delivered to the Plaintiffs fairly and *bonâ fide*, and for a good and valuable consideration, that is to say, for monies advanced by, and due and owing to them, the Plaintiffs. And that, at the time when the said bill was so indorsed and delivered to them as aforesaid, they had not, nor had either of them, notice of the premises in the last-mentioned plea mentioned; nor did they, or either of them, know that the said *T. Hunt* had no power or authority to negotiate or part with the said bill on his own account; and this they were ready to verify, &c. To the third, — that the said *E. M. Roberts* was duly authorised to accept the said bill on behalf of himself and all the other Defendants in this action. That, after the making of the said bill, and before the same had become due and payable, to wit, on the said 4th of *January* 1834, the said bill was indorsed and

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redelivered to the Plaintiffs, fairly and *bonâ fide*, and for a good and valuable consideration, that is to say, for monies advanced by, and due and owing to them, the Plaintiffs. And that, at the time when the said bill was so indorsed and delivered to them as aforesaid, they had not, nor had either of them, notice of the premises in the last-mentioned plea mentioned; nor did they, or either of them, know for what purposes the said *E. M. Roberts* was authorized to accept the said bill of exchange, nor for what purpose he accepted the same: and this they were ready to verify, &c.

The Defendants in the introductory part of the first plea named, demurred to the replication to the second plea, for the following causes:—That the Plaintiffs had not, in their said last-mentioned replication, stated or set forth, with sufficient certainty, what consideration or value was given by them for the said indorsement of the said bill to them, but had merely stated that the consideration for the said indorsement to them was monies advanced by, and due and owing to them, without stating with sufficient certainty when or to whom such monies were advanced, or by whom the same were due and owing, or whether they were advanced at the time when the said bill was indorsed to them, or whether they had been previously advanced, and were due before the said bill was indorsed; and that, although the replication was intended as an answer to the second plea, and to support the whole of the Plaintiffs' claim to the full amount of the bill, yet it did not aver or state, with sufficient certainty, that the monies so advanced by, and due and owing to them, were equal to the amount of the said bill, or entitled them to recover to the full extent of the said bill, which, according to the rules of pleading, ought to have been shewn in the said replication to the said second plea: that the Plaintiffs, who were parties to the indorsement

of the said bill, and knew what consideration they gave for the same, ought to have set forth in the said last-mentioned replication with more certainty than they had done the nature and extent of the consideration which they gave for the said indorsement, and when that consideration was given, to have enabled the Defendants, who were no parties to the indorsement, or to the alleged consideration for the same, to ascertain what that consideration, if any, was; and also to have enabled the Court to decide, as a point of law, whether such consideration was or was not sufficient to support the Plaintiffs' claim to recover the full amount of the bill against the Defendants under the circumstances mentioned in the second plea, which was a mixed question of law and fact.

They also demurred to the replication to the third plea, for the following causes: — That whereas the last-named Defendants had in their said third plea alleged that the said bill never was accepted by the said Defendants, except by the said *E. M. Roberts* for and on account of himself and all the said other Defendants in this action, under and by virtue of an authority from the last-mentioned Defendants to the said *E. M. Roberts* to accept bills of exchange on behalf of himself and the other Defendants, for such particular purposes only as in the said last plea mentioned, but that the said *E. M. Roberts* accepted the said bill on behalf of himself and all the other Defendants in this action, not on account of any of the purposes for which he was so authorised to accept bills on behalf of himself and the other Defendants as aforesaid, but for another and different purpose; yet the Plaintiffs, in their replication to the said last-mentioned plea, had not confessed and avoided the said allegations in the said last-mentioned plea, or directly traversed the same or either of them; but by alleging that the said *E. M. Roberts* was duly authorised to accept the said bill on

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behalf of himself and the other Defendants in this action, had, contrary to the rules of pleading, denied the said allegations by an argumentative traverse thereof. That the Plaintiffs, if they had intended to raise the question whether or not the said bill was duly accepted by the said *E. M. Roberts*, ought to have distinctly taken issue upon some one of the facts mentioned in the plea, or have alleged that it was accepted for the purposes for which the said *E. M. Roberts* was authorised to accept bills as mentioned in the said last plea. That the Plaintiffs did not in their replication confine themselves to traversing the last plea in manner above alleged, but also by their said replication proceeded to plead by way of avoidance of the matters alleged in the last plea, by stating and alleging in their said replication thereto, that after the making of the said bill, and before the same had become due and payable, the said bill was indorsed and delivered to the Plaintiffs fairly and *bonâ fide*, and for a good and valuable consideration; and that when the said bill was so indorsed and delivered to them, they had not nor had either of them notice of the premises mentioned in the said last plea, which premises they had actually traversed in the commencement of their replication. That the last-mentioned replication was double and multifarious, and attempted to answer the last plea both by traversing the substantial allegations contained in it, and also by attempting to shew matters in avoidance of the plea without confessing it. That the Plaintiffs did not in their last-mentioned replication shew with sufficient certainty when or to whom the monies therein alleged to have been advanced by and due and owing to them were advanced; or by whom they were due and owing, or what was the amount of such monies. That the said last-mentioned replication should have concluded to the country as being a traverse of the last plea, and not

with a verification. Also that it was uncertain whether the last replication was intended as an answer to the plea by way of traverse, or of confession and avoidance thereof: and that the replication was in other respects uncertain, informal, and insufficient, and no certain issue could be taken thereon.

Joinder.

Bonpas Serjt. in support of the demurrer, in addition to the grounds above set forth, urged, that the new rules, requiring the Defendant in actions on bills of exchange to plead what he would before have given in evidence under the general issue; these actions are no longer an exception to the general principles of pleading, and the Plaintiff ought to reply with at least as much particularity as he would have declared in other actions; that is, by shewing the nature of the consideration for the contract. When suspicion was cast upon a transaction, it was always incumbent on the Plaintiff to shew affirmatively in evidence a good consideration; *Heath v. Sansom* (a); *Roser v. Roser* (b); now, it is incumbent on him to plead it. A replication ought to be more particular than a count; and in a count, an averment of money paid as a consideration for a promise would not be sufficient, even after verdict, without adding, "for the Defendant's use," or "at his request." *Hayes v. Warren* (c); *Oliverson v. Wood*. (d) So, in actions on guaranties, it was necessary to set out the precise consideration for the promise: *Marriot v. Lister*. (e) [*Tindal* C. J. The third plea contains no averment that the Plaintiff had notice of the circumstances from which you raise the presumption of fraud.] It would have been unnecessary, before the new rules, for the

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(a) 2 B. & Adol. 291.

(b) 2 Ventr. 361.

(c) 2 Str. 933.

(d) 3 Lev. 366.

(e) 2 Wils. 141.

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Defendant to give such notice in order to raise the objection at the trial, and therefore, it is unnecessary now to plead it.

Kelly contra, being relieved by the Court, as to the third plea, contended that the replication to the second was sufficient. The law as to bills of exchange is not altered by the new rules; and before they were promulgated, if a Defendant in an action on a bill made out a *prima facie* case of fraud, it was a sufficient answer for the Plaintiff to shew he gave consideration for the bill. It was immaterial whether that consideration passed to the indorser. So here, if the Plaintiffs, as they allege, advanced money for this bill, or took it for money due to them, it is immaterial to whom they advanced the money, or from whom it was due. They have, therefore, shewn a specific consideration. But it was not necessary for them to have alleged more than that they gave a consideration for it, without specifying what. It would place the paper currency under great difficulties, if the holders of bills were always bound to disclose before trial the precise consideration they may have given for their bill.

Bompas. Cases of fraud present an exception to the general rule; they can only be answered by specific statements; and the statement here is too general.

TINDAL C. J. The third plea in this case, which is pleaded to an action brought by the indorsees against the acceptors of a bill of exchange, is in effect no more than this, — that the Defendants were defrauded of the bill of exchange, and that the acceptance was given by them without consideration. Now, inasmuch as the indorsee of a bill of exchange is by law *prima facie* assumed to hold it for consideration; inas- much as

we are not to presume a notice which would make him a fraudulent agent in taking a bill of exchange; and inasmuch as this plea is silent upon the subject of want of consideration on the part of the indorsees, or of notice of the fraud, we are to ask ourselves whether upon the transfer of a bill of exchange, the circumstance of the acceptor having been defrauded at the time when he gave the acceptance, is an answer against an innocent indorsee for a valuable consideration without notice; — it seems to me that it is not a sufficient answer.

The second plea, upon which greater reliance is placed by the Defendants, comprehends those two circumstances in which the third plea is deficient. The second plea does, in effect, allege that the Defendants, the acceptors, had been defrauded of the acceptance which they had given to a third person to hold; that notice of the fraud was given to the Plaintiffs; and that the Plaintiffs received the bill by indorsement without a full and valuable consideration. Now the answer to that in the replication, is the point upon which the objection has been taken. The answer in the replication to the second plea is, that after the making of the bill, and before the time it had become due and payable, it was indorsed and delivered to the Plaintiffs fairly and *bonâ fide*, and for a good and valuable consideration, that is to say, for money advanced by, and due and owing to them the Plaintiffs, and that they had no notice whatever of the premises in the plea mentioned. Therefore it is, in effect, a denial that they ever had any notice, and an assertion that the bill was given to them for a full and valuable consideration. The question is, whether they are bound to go into the matter more fully, and state a more particular consideration. The objection made to the replication is, that there is not a sufficient consideration affirmatively stated to have passed between the indorser of the bill and the indorsees who have brought

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the action. Taking the replication in the terms in which it is stated, that the bill was received *bonâ fide* and for a full and valuable consideration, for money advanced by, and due and owing to the Plaintiffs, it seems to me that it was unnecessary for the Plaintiffs to allege a more distinct consideration. It was sufficient to shew that there was a good consideration. If money passed from the present indorsees, it appears to me sufficient as against the acceptors of a bill of exchange, to allege that the bill was received for money advanced by and due and owing to them, although that might not be sufficient for maintaining an action against another person. The consideration seems to me to be sufficiently averred in the replication, so as to leave the minds of the Defendants in a general degree of certainty upon the nature of the consideration upon which the Plaintiffs mean to rely. As in the case referred to in *Com. Dig. Pleader*, F. 17., where in trespass for three loads of oats, the defendant justified for damage feasant; the plaintiff replied that *tempore quo et diu antea* he was parson, and took for tithes; though he did not say that he was parson at the time of the severance, yet it should be intended: and a person of plain understanding will interpret this in the same way, that there has been a money consideration passing from the Plaintiffs. That appears to me to dispose of the objection which has been made. If, upon the face of the record; we are satisfied affirmatively that there is a consideration shewn, it seems to me to be sufficient to dispose of the objection. Upon the case itself I am disposed to go further, and to declare my opinion to be, that if the replication had contained a simple denial of the allegation of want of consideration, it would appear to my mind to be sufficient. It seems to me to bear a resemblance to a case where an executor, defendant, pleaded two outstanding judgments, to each of which the plaintiff replied fraud, and traversed

that the debts recovered were due for just debts: the replication was holden good on a special demurrer, the Court observing, that the plaintiff might traverse the special matter, or rely on the fraud generally at his election. (a) No case can be cited in which the contrary has been expressly decided. It seems to me, therefore, that with reference to the principle, as well as the particular circumstances of this case, the replication to the second plea is a good replication; and, upon the whole, I think there must be judgment for the Plaintiffs.

PARK J. I quite agree that the third plea is bad. With respect to the main point, it seemed to me, at the beginning of the argument, that it was sufficient to reply generally that there was a fair and *bonâ fide* consideration, without proceeding to state specifically what the consideration was. The great difficulty now arises upon the new rules: as the Defendant is obliged to put upon the record what the defence is, what ought the replication to be in an action upon a bill of exchange? It seems to me to be of importance to the commercial transactions of this country, that there should be a great allowance made for the generality of replication upon bills of exchange; otherwise it would lead to inconvenience, and would cramp and restrain the negotiability of such instruments. Therefore, I am the more inclined to concur with my Lord Chief Justice in thinking that a general allegation of consideration would have been sufficient in this case. That is my opinion, because it seems to me to be a sufficient and specific statement. When the Defendants aver that they lost this bill of exchange, and that it was got from them by fraud, and all those circumstances which tend to shew

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(a) See *Trethewy v. Ackland*, 2 Saund. 49.

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that it was taken without sufficient consideration, and the replication states that it was taken for a full, fair, and *bonâ fide* consideration, it seems to me that it is not necessary there should be such further particularity as has been insisted on. If the bill of exchange was indorsed and delivered to the Plaintiffs for a good and valid consideration, that is to say, for money advanced by, and due and owing to the Plaintiffs, and they say that at the time it was indorsed to them, they had no notice whatever of the fraud, it must be taken that the bill was given for some antecedent debt. According to the plain import of the words, it would lead any man to conclude that, at the time of the indorsement, there was a full, fair, and *bonâ fide* consideration given for this bill of exchange. Therefore, I am of opinion there ought to be judgment for the Plaintiffs.

VAUGHAN J. I am of the same opinion. I think we should cramp transactions in the commercial world, and do considerable mischief, if we were to come to any other conclusion.

BOSANQUET J. I am of the same opinion upon both points. With respect to the third plea, I think it is insufficient; and I shall make no further observation on that head. With respect to the replication to the second plea, it appears to me, as it does to my brothers, that the replication is good. I think, in the first place, that a good and sufficient consideration has been alleged in this replication. I am also disposed to concur with the rest of my brothers upon this point,—that it is sufficient for the Plaintiff, in his replication, to aver generally that a good and valuable consideration was given. I am disposed to think that the replication would have been quite sufficient if it had not added the words “for money advanced by, and due and owing

to the Plaintiffs," thereby setting out the nature of the consideration; but that it was sufficient to say "that after the bill was made, and before it became due and payable, on a specified day, the bill was indorsed and delivered to the Plaintiffs fairly and *bonâ fide*, and for a full and valuable consideration." Upon the whole, therefore, I think there must be judgment for the Plaintiffs.

Judgment for Plaintiffs.

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THE Court having given judgment as above,

Bompas Serjt. obtained a rule *nisi* for leave to the Defendants to withdraw their demurrer, and rejoin, on payment into Court of 500*l.*, the amount of the bill for which the action was brought.

This rule was granted on an affidavit by the Defendants' attorney, that he had been informed and believed that the bill had been negotiated by *Hunt*, the secretary of the company to which the Defendants belonged, in violation of a trust reposed in him:

That the Plaintiffs, who had discounted the bill for *Hunt*, made up the amount by deducting 5*l.* due to them from *Hunt*:

That *Hunt*, previously to this, although furnished with cheques on the company's banker, had given to the Plaintiffs, cheques on his own private banker, in payment of debts due to them from the company; that some of those latter cheques had been dishonored; that the Plaintiffs had never apprised the company of the

(See *ante*, p. 469.) and where upon demurrer judgment was given for Plaintiff on such a replication, the Court refused to allow Defendant to withdraw the demurrer on payment of costs.

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circumstance, but had given *Hunt* time, and finally adopted the balance remaining due, (57*l.*), as a debt due to them from *Hunt* in his private capacity: Lastly, that the demurrer had been pleaded upon the advice of counsel, and that deponent was advised and believed that the Defendants had a good defence upon the merits.

The Plaintiffs' clerk, in answer, denied that the Plaintiffs had knowledge of any fraud committed by *Hunt*; asserted that they had given full value for the bill; and further, that *Hunt* having come to them, a few days before the bill was due, with another bill of the Defendants for 1000*l.*, and having requested Plaintiffs to discount the same, retaining for themselves the 500*l.* due on the former bill, their suspicions were excited, they detained the 1000*l.* bill, apprised the Defendants of the circumstance, and *Hunt* absconded.

Wilde Serjt. who shewed cause, contended, that upon this state of facts, the Defendants had no claim to the indulgence for which they had applied, and objected to the absence of an affidavit from the Defendants themselves, that they had a good defence upon the merits.

Bompas, in support of the rule, insisted that the Plaintiffs had implicated themselves in *Hunt's* misconduct, by omitting to apprise the Defendants in the first instance, that *Hunt* had been paying the company's debts with cheques on his own private banker, and that some of those cheques had been dishonoured: it was essential to the defence, therefore, that the Plaintiffs should show on their replication the precise consideration given for the bill; the demurrer had been pleaded under the advice of counsel; the sufficiency of the replication was a nice question, arising for the first time on the construction of the new rules; and, therefore, upon

payment of costs, and depositing the amount of the bill in Court, it was a fit case for the Court in its discretion to allow the demurrer to be withdrawn.

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TINDAL C. J. The law of *Westminster Hall*, I believe, ever since it stood in the place in which it now stands, has been, that if a party thinks proper to rest his defence or his case upon a point of law raised upon the record, he must either stand or fall upon the point so raised. I do not mean to say that a case may not arise where a point being so taken, a party may, even after judgment, apply to the Court to amend; but according to the advice of Lord *Coke*(a), you ought never to rely upon a point of law when the facts are in your favour. Now, here it was very easy to have raised the question of fact, whether or not the bill was received for a valuable consideration; and not to have put the right of the Plaintiffs upon a special point of pleading. Although there are excepted cases which will always be attended to, I should expect, after an argument has been heard and judgment given for the Plaintiff, at least a distinct affidavit of merits from those who make the application. It does not appear, however, that there is any such affidavit here. Nor are the facts deposed to such as bring the case within the usual grounds of such applications: those facts only raise an argumentative case: from what I have heard, if I had been a jurymen, I should think the discount of this 500*l.* bill, minus the 57*l.*, shewed a confidence in the integrity of this transaction rather than any collusion between the Plaintiffs and *Hunt*: and when I heard further that a 1000*l.* bill was brought to them and they refused to have any thing to do with it, that, would have corroborated in my mind the fairness of the transaction. Therefore it is

(a) *Butler and Baker's case*, 3 *Rep.* 25.

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that I think this is an application which ought not to have been made, and the rule must be discharged.

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The rest of the Court concurring, the rule was

Discharged.

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JONES v. BROWN and Others.

In trespass, Defendants, after alleging that *M.* had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: Plaintiff replied that the goods belonged to him and not to Defendants: Held, that upon this issue it was not incumbent on Defendants to give formal proof of *M.*'s bankruptcy and their appointment as assignees.

TRESPASS for breaking and entering Plaintiff's close, and taking his goods.

The Defendants suffered judgment by default as to breaking and entering the close; but as to taking the goods, pleaded,

First, not guilty; secondly, that the goods were not the goods of the Plaintiff; and, thirdly, (in substance), that before the said time when, &c. in the declaration mentioned, a commission of bankrupt issued against one *Medcalf*, a trader, under which all his goods, chattels, and effects were transferred to his assignees, *Cornthwaite* and *Mills* of *Liverpool*; that the goods, chattels, and effects in the declaration mentioned were the goods, chattels, and effects of *Cornthwaite* and *Mills*, as such assignees as aforesaid; that whilst the said *George Medcalf* remained and continued such bankrupt as aforesaid, the said goods and chattels of *Cornthwaite* and *Mills*, as such assignees as aforesaid, were in the possession of the said *George Medcalf*: that the said goods, chattels, and effects, so being the goods, chattels, and effects of *Cornthwaite* and *Mills* as such assignees as aforesaid, and *Medcalf* remaining such bankrupt as aforesaid, the Plaintiff claiming title to the said goods, chattels, and effects, under colour of a certain gift having been thereof made to him by *Medcalf* (whereas

nothing of or in the said goods, chattels, or effects in the declaration mentioned, ever passed by virtue of that gift), afterwards and before the said time when, &c. and whilst the said goods, chattels, and effects in the declaration mentioned, were the goods, chattels, and effects of *Cornthwaite* and *Mills* as such assignees as aforesaid, and whilst *Medcalf* remained such bankrupt as aforesaid, to wit, on the 20th of *March* 1834, in the declaration mentioned, became and was possessed of the said goods, chattels, and effects in the declaration mentioned; and thereupon the Defendants, on the day and year in the declaration in that behalf mentioned, as the servants and by the command of *Cornthwaite* and *Mills* as such assignees as aforesaid, seized, took, and carried away the said goods, chattels, and effects in the declaration mentioned, so being in the possession of the Plaintiff as aforesaid, as they lawfully might for the cause aforesaid; which were the same supposed trespasses in the introductory part of the first plea mentioned, and whereof the Plaintiff had complained against the Defendants; and that, they were ready to verify, &c.

The Plaintiff joined issue on the first and second pleas: and as to the third, replied that the goods, chattels, and effects in the declaration mentioned, at the time when, &c. were not the goods, chattels, and effects of *Cornthwaite* and *Mills* as assignees as aforesaid, in manner and form as the Defendants had above alleged, but were the goods, chattels, and effects of the Plaintiff as in the declaration mentioned.

At the trial before *Park J.*, last *Warwick* assizes, the Plaintiff attempted, by witnesses and writings, to shew that *Medcalf* was carrying on business with the sanction of his assignees; that a transfer of the goods in question by him to the Plaintiff had been made *bonâ fide*; and that the Plaintiff being so in possession, the Defendants seized the goods.

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The Defendants' counsel, conceiving this to be the whole of the Plaintiff's case, called no witnesses; but, commenting on the facts proved, contended that, even according to the testimony for the Plaintiff, the transfer to him was a fraud.

Park J. directed the jury to consider whether *Medcalf* was carrying on business with the sanction of his assignees, and whether the transfer of the goods to the Plaintiff was made *bonâ fide*; when

The Plaintiff's counsel interposed, and urged, that as the Defendants, without proof of title, were wrong-doers, the Plaintiff, who was in possession of the goods, was entitled to a verdict, unless the Defendants gave some proof of their being *Medcalf's* assignees. But

The learned Judge thought that, after the case was closed on both sides, this objection came too late; and that the Plaintiff, by traversing only the Defendants' allegation of property in the goods, admitted the allegation that they were *Medcalf's* assignees: and

The jury being satisfied that the transfer was a fraud, found a verdict for the Defendants on the pleas, and one farthing damages for the Plaintiff on the judgment by default. Whereupon,

Hill obtained a rule *nisi* for a new trial, on the ground that, on these pleadings, the Plaintiff had not admitted the Defendants to be assignees of *Medcalf*; and as they had called no witnesses, they must be taken to be wrong-doers, against whom, under any circumstances, the party in possession of the goods was entitled to a verdict.

Goulburn Serjt., Hunfrey, and Mellor shewed cause. They insisted that the Plaintiff's case had been conducted solely with a view to prove the *bona fides* of the transfer, in support of which, various writings were

produced, and witnesses examined; that after this, it was not competent to him to recur to and rely on a mere possessory title: *Sherriff v. Cadell* (a): that according to *Abbott v. Parsons* (b), the Court would not permit a party to move for a new trial on an objection to the applicability of evidence, unless the objection were taken before the judge commenced his summing up; and that in *Robinson v. Cook* (c), it was held, that where the Plaintiff's counsel acquiesces in the judge's ruling at the trial, whereby the Defendant takes a verdict without going into his case, the Plaintiff will not be afterwards permitted to move for a new trial on the ground of a misdirection.

Hill and *Amos* in support of the rule, maintained, that upon the issues raised in this cause the Plaintiff, as possessor of the goods, ought to have judgment. In trespass, unless the Defendants prove a title, possession is sufficient, as against a wrong-doer: per *Ellenborough C. J.* in *Chambers v. Donaldson*. (d) *Sherriff v. Cadell* was an action of trover, where the Plaintiff must establish a title. The Defendants' title not being admitted on these pleadings, they were never released from their obligation to prove it, although the objection was not taken till late in the cause.

TINDAL C. J. I abstain from adverting to that part of the case which relates to the time when the objection was taken at the trial by the counsel for the Plaintiff, although I entertain a strong opinion on the subject; but shall decide this rule upon the pleadings in the cause.

This is an action of trespass for breaking and entering the Plaintiff's house, and for taking his goods.

(a) 2 *Esp.* 617.(b) 7 *Bingh.* 563.(c) 6 *Taunt.* 336.(d) 11 *East*, 69.

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As to entering the house, the Defendants have suffered judgment to go by default; as to the goods, they plead, first, the general issue; secondly, that the goods did not belong to the Plaintiff; and thirdly, in substance, that a commission of bankrupt had issued and was still in force against one *Medcalf*, under which his goods, being the goods mentioned in the declaration, passed to his assignees; that those goods so belonging to the assignees were left in the possession of *Medcalf*. when the Plaintiff took them, claiming by colour of a gift from *Medcalf*; whereupon the Defendants, as servants of the assignees and by their command, took the goods from the Plaintiff, as being in truth the goods of *Medcalf's* assignees.

The Plaintiff only replies that they were not the goods of the assignees, but the goods of the Plaintiff.

The third plea contains several matters which were capable of being denied, and which, if not denied, shew title in the assignees.

But it is contended on behalf of the Plaintiff that, having taken issue on a single allegation, he is not to be considered as having therefore admitted all the other allegations of the plea, and that the Defendants ought to establish by proof the truth of those other allegations. I think, however, that this is not the result of such a state of the pleadings; but, on the contrary, that, as the Plaintiff, who might have denied all the allegations, has singled out only one to be put in issue, he must be taken, for the purpose of this cause, to have admitted the rest.

Nothing is more common than in actions of trespass for the Defendants to allege that a writ of *fi. fa.* issued against *A. B.*; that the goods in respect of which a trespass is supposed to have been committed, were the goods of *A. B.*, and that the Defendants took them by virtue of the writ. If the Plaintiff simply denies that the goods in question were the goods of *A. B.*, he is

not allowed to say that he has never admitted the judgment and execution against *A. B.*

Here the Plaintiff might have shewn that the goods were not the identical goods to which the commission of bankruptcy against *Medcalf* applied. That would have entitled him to a verdict. Or he might have shewn that the assignees had so long suffered *Medcalf* to carry on business with the stock of his assignees, that goods sold by him must be taken to have been sold with their assent. No such evidence, however, was given; but the whole case shewed that the transfer from *Medcalf* to the Plaintiff had been made for the purpose of fraud. Are we then in such a case to say that the Plaintiff can avail himself of the bare fact of possession, where he might have disputed, but has not ventured to dispute, the title pleaded by the Defendants?

I think that the Plaintiff, having omitted to contest the Defendants' title at the proper season, cannot now object that it was not supported by evidence at the trial. The rule must be discharged.

PARK J. The replication, by denying only that the goods in question belonged to the assignees, admits, in effect, that the assignees were entitled to the goods of *Medcalf*. That brings us to the matter of fact, whether *Medcalf* had the authority of the assignees to transfer them to the Plaintiff. That was the case set up by him, and never was a case supported by more reprehensible witnesses.

VAUGHAN J. It is not disputed that possession is *prima facie* evidence of property. But the Plaintiff here has not disputed the title of the assignees to *Medcalf's* goods; and it was for the jury to say whether there had been any lawful transfer from *Medcalf* to the Plaintiff.

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BOSANQUET J. I think the bankruptcy of *Medcalf* and the proceedings under the commission are admitted on these pleadings. If so, it is impossible to doubt that the verdict is correct.

Rule discharged.

Jan. 27.

WILKINSON v. OLIVEIRA.

The declaration stated, that in consideration Plaintiff, at the request of Defendant, had given Defendant a letter written by O., since deceased, by means of which letter Defendant was enabled to, and did determine controversies, and obtain a large portion of O.'s effects, Defendant promised to give Plaintiff 1000*l.*: Held, that a sufficient consideration was disclosed to sustain an action on the promise.

THE declaration stated, that divers disputes and controversies had arisen between the Defendant and divers other persons, respecting the disposition of the estate and effects of one *Dominick Oliveira*, then late deceased, and the right of the Defendant to the possession of any and what part thereof; in which disputes and controversies it became and was necessary, for the termination thereof in favour of the Defendant, that the Defendant should prove that the said *Dominick Oliveira* was, at the time he made his will, and at the time of his death, an alien, and a native of *Portugal*: that the Plaintiff was lawfully possessed of a certain writing and paper, being a letter written by the said *Dominick Oliveira*, in his lifetime, to the Plaintiff, which said letter shewed, declared, and proved that the said *Dominick Oliveira* was, at the time he made his will, and at the time of his death, an alien and a native of *Portugal*: that the Plaintiff, at the request of the Defendant, gave to the Defendant the said letter, to be used and employed by the Defendant for the purpose of proving that the said *Dominick Oliveira* was such alien and native of *Portugal* at the time he made his will and at the time of his death: that the Defendant used and employed the said letter for the said purpose: and that, by means of the said letter and of the matters

therein contained, the Defendant was enabled to, and did cause the said disputes and controversies to be determined in favour of him, the Defendant, and did, by means of the said letter and of the matters therein contained, become lawfully possessed of and acquired a large portion of the estate and effects of the said *Dominick Oliveira*, of great value, to wit, of the value of 100,000*l.*, &c. And thereupon, to wit, on, &c. at, &c., in consideration thereof, and that the Plaintiff, at the special instance and request of the Defendant, had then and there given the said letter to the Defendant, the Defendant then and there undertook and faithfully promised the Plaintiff to give him, the Plaintiff, a certain sum of money, to wit, the sum of 1000*l.*

Breach,—refusal to give the 1000*l.* in conformity with the promise.

Plea, that the Defendant was not by means of the letter enabled to, and did not by means thereof cause the said disputes to be determined in favour of the Defendant, and that the Defendant did not, by means of the letter, become possessed of a portion of the estate of *Dominick Oliveira*, of the value of 100,000*l.*

Demurrer,—for putting in issue matter not properly issuable, and for not denying, or confessing and avoiding, the breach of promise. Joinder.

Kelly, for the Plaintiff, was called upon by the Court to support the declaration. The consideration, though past, is alleged to have arisen at the Defendant's request, which renders it sufficient to impart validity to the Defendant's promise; and though the letter in question is alleged to have been *given* to the Defendant, the statement amounts to this,—that, in consideration the Plaintiff had put the Defendant in possession of a document by which the Defendant was enabled to recover 100,000*l.*, the Defendant undertook to give the

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1835. Plaintiff in return 1000*l*. For such an undertaking the delivery of the document was ample consideration.

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Talfourd Serjt., *contra*, contended that, taking the whole declaration together, it appeared plainly the letter had been handed to the Defendant by way of a spontaneous gift; and such a gift was no consideration for a promise to pay.

TINDAL C. J. What would you say to the case of a man who, entering a shop, should say, I'll give 10*l*. for such an article. Here the word *give* is used on both sides. It is a gift upon a mutual consideration.

Per Curiam. There must be

Judgment for the Plaintiff.

Jan. 27.

HODGES v. Earl of LITCHFIELD.

Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages,

THIS was an action of assumpsit, brought by the Plaintiff to recover from the Defendant damages for the breach of a special contract for the sale of an estate by the Defendant to the Plaintiff.

The declaration stated, by way of inducement, (amongst other things), that before the making of the promise and undertaking of the Defendant thereafter mentioned, to wit, on the 7th of *November* 1828, by certain articles of agreement, made and entered into between *Robert* expenses incurred previously to entering into the contract; nor the expense of a survey of the estate; nor the expense of a conveyance drawn in anticipation of a completion of the purchase; nor the extra costs of a chancery suit touching the purchase, in which the vendor is defeated; nor losses sustained by the purchaser, in the resale of stock prepared for the estate. But he is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose; and interest on his deposit money.

8 Bear 104 10. N. 4. 16.
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Harvey Wyatt, as agent for and on behalf of the Defendant (then Viscount *Anson*), his heirs, executors, and administrators, of the one part, and the Plaintiff for himself, his heirs, executors, and administrators, of the other part, the said *R. H. W.* agreed to sell, and the Plaintiff agreed to purchase, the free and exclusive fishery of the Defendant in the River *Trent*, as advertised to be sold by auction on the 21st of *October* then last, with the right and privilege of landing nets upon, and angling from the lands of the landowners adjoining the river, and the several farms, lands, and hereditaments, described in the schedule to the said articles of agreement, for the sum of 21,500*l.*; of which the sum of 1500*l.* was then paid, and the sum of 20,000*l.*, the remainder thereof, was to be paid on the 25th of *March* then next; and if the payment should be delayed after that time, and such delay should be occasioned by the Plaintiff, the Plaintiff should pay lawful interest on his purchase-money from thence, until the time of final payment, and should be entitled to the rents and profits of the premises from the said 25th of *March* then next, to which time all outgoing would be cleared by the Defendant; and it was thereby declared that an abstract of the title should be ready for delivery to the Plaintiff, on or before the 25th of *December* then next, at Mr. *Keen's* office in *Stafford*; and if the Plaintiff, or any person on his behalf, should object to the Defendant's title, or require any act, matter, or thing to be done, procured, or executed, for the completion thereof, notice in writing of the particular objection or matter required should be given to Mr. *Keen* on or before the 21st of *February* then next, or otherwise the Plaintiff and all persons claiming under him should waive the same, and should be held to have accepted the title: of which articles of agreement the Defendant had notice. That thereupon, in consideration of the

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premises, and also in consideration that the Plaintiff at the Defendant's request had undertaken and faithfully promised the Defendant to perform and fulfil all things in the said articles of agreement contained on his part and behalf to be performed and fulfilled, the Defendant then and there consented to and approved of the said articles of agreement, and then and there undertook, and faithfully promised the Plaintiff that the Defendant would make, or procure to be made, a good title to the said estate, free of tithes, on or before the said 25th *March* then next; and would perform and fulfil all things in the said articles contained on his part and behalf to be performed and fulfilled. The Plaintiff then averred, that an abstract of the title to the said estate being afterwards, and before the said 25th of *December* then next, to wit, on, &c., delivered to the Plaintiff, one *R. H. W. Ingram*, a conveyancing counsel, employed by and on behalf of the Plaintiff, did thereupon object to the Defendant's title, and required certain acts, matters, and things to be done, procured, and executed, for the completion thereof. That although notice in writing of the particular objections and matters so required was afterwards, and before the said 21st of *February* then next, to wit, on the 17th of *February* 1829, given to the said *Keen* in the said articles of agreement in that behalf mentioned; and although the Plaintiff was afterwards, to wit, on, &c., ready and willing, and often offered to pay the said sum of 20,000*l.*, the remainder of the said purchase-money, and to complete the purchase, on having a good title to the said estate to be sold free of tithes; and had always from the time of making the articles of agreement well and truly performed and fulfilled all things therein contained on his part and behalf to be performed and fulfilled, according to the tenor and effect, true intent and meaning thereof; yet the Defendant, not regarding the said articles of agree-

ment, did not nor would, on or before the said 25th of *March* in the year last aforesaid, or at any time afterwards, make or procure to be made a good title to the said estate free of tithes, but wholly refused and neglected so to do. By reason of which said several premises, the Plaintiff not only lost and was deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the completion of the said purchase, but was *put to great charges and expenses*, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, in and *about the negotiating and agreeing for the purchase of the said estate, and having the same surveyed; and about the investigating the title to the said estate, and the existence and effect of the said supposed modus* in the said articles mentioned; and in and *about his defence of and in a certain suit commenced and prosecuted by the Defendant against the Plaintiff in the Court of Chancery, for compelling a specific performance by Plaintiff of the said articles of agreement, and in which suit the bill filed by the Defendant against the Plaintiff was dismissed by the same Court; and in and about the making and performing of divers journies, and otherwise respecting the said purchase: and also thereby the Plaintiff lost and was deprived of a great part of the gains and profits which he might and would otherwise have made and acquired, from using and employing the said sum of 1500*l.*, so paid by him as aforesaid, and other monies provided and kept by Plaintiff for the completion of the said purchase; and suffered and sustained divers losses, to a large amount, to wit, to the amount of 200*l.*, on the resale of certain sheep, bricks, and hurdles, purchased by the Plaintiff for the stocking of the said farms, lands, and hereditaments, and improving the same, with a view to the completion of the said purchase.*

The Defendant pleaded the general issue, and after-

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wards, under an order of *nisi prius*, a verdict was entered for the Plaintiff; but such verdict was to be subject to the opinion of the Court, after an award should have been made by an arbitrator, who was thereby empowered to ascertain and settle the amount which would be properly payable to the Plaintiff on each and every of the following heads of claim stated in the declaration, in case the Court should be of opinion that the Plaintiff was entitled to recover thereon respectively: that is to say, the Plaintiff's charges and expenses,—first, in and about the negotiating and agreeing for the purchase of the estate agreed to be sold, and having the same conveyed:—secondly, in and about investigating the title to the said estate, and the existence and effect of a supposed *modus* in lieu of tithes:—thirdly, in and about the defence of the suit in Chancery mentioned in the declaration:—fourthly, in and about the making and performing of divers journies, and otherwise respecting the purchase:—fifthly, the Plaintiff's loss in being deprived of the gains and profits he might have made from using the 1500*l.* mentioned in the declaration. The claim in respect of loss on the resale of sheep, &c. was abandoned.

The arbitrator found, that 6*l.* 11*s.* 8*d.* would be properly payable by the Defendant to the Plaintiff for his expenses in negotiating and agreeing for the said purchase; the sum of 4*l.* 9*s.* 8*d.*, parcel thereof, being expenses incurred by the Plaintiff with his own agent in and about the said negotiation, and prior to the execution of the articles of agreement. And that 10*l.* 10*s.* would be properly payable for the expense of having the estate surveyed.

As to the second head of claim, the arbitrator found that the sum of 128*l.* 10*s.* 10*d.* would be properly payable in respect thereof, which sum was composed of the following particulars: the sum of 87*l.* 1*s.* 10*d.* for the charges of the solicitor of the Plaintiff in the investi-

gation of title, allowed on taxation; 7*l.* 12*s.* 6*d.*, the expenses and coach-hire of the said solicitor in a journey to and from *Stafford* relating to the same matter, and also allowed on taxation; 6*l.* 17*s.* 2*d.*, the fees paid in searching for judgments and other incumbrances, which searches were made on the 27th of *February* 1829; 1*l.* 11*s.* 4*d.*, fees paid in other necessary searches; and 25*l.* 8*s.*, expended in fees to counsel. But of the said sum of 87*l.* 1*s.* 10*d.*, the arbitrator found that 6*l.* 17*s.* 2*d.* were for solicitor's charges in attending to make the searches first above-mentioned; and 16*l.* 9*s.* 4*d.* for solicitor's charges in preparing conveyances on the 27th of *February* 1829; and of the said sum of 25*l.* 8*s.*, the sum of 10*l.* 10*s.* was for counsel's fees in settling the same conveyances: and he also found that of the said sum of 87*l.* 1*s.* 10*d.*, the further sum of 10*l.* 18*s.* was for charges incurred after the date of the filing of the bill by the Defendant to compel the specific performance above mentioned.

As to the third head of claim, the arbitrator found, that the said bill was dismissed with costs; that the Plaintiff's costs in defending himself against the said bill were taxed as between party and party; and that the amount of such taxed costs had been duly paid to him; but that there remained the sum of 194*l.* 4*s.* 11*d.*, which had been paid by him to his solicitors for the extra charges as between solicitor and client in the course of such defence; and the arbitrator found that the said sum of 194*l.* 4*s.* 11*d.* would be reasonably payable to the Plaintiff under the third head.

As to the fourth head of claim, the arbitrator found, that in the course of the negotiation for and about the purchase, and of the defence of the Plaintiff in the said suit, it became reasonable and prudent for the Plaintiff to take certain journies and to incur certain expenses, and that the sum of 45*l.* would be properly payable to the Plaintiff in respect thereof.

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And as to the fifth head of claim, the arbitrator found that, upon the dismissal of the Defendant's bill in equity, with costs, the deposit of 1500*l.*, theretofore advanced by the Plaintiff, was ordered to be returned; that the Plaintiff thereupon applied to the Court of Equity for an order for the allowance of interest thereon; and that an order was made, and had been performed, for the payment of interest at the rate of 4 per cent., from the 7th of *November* 1828 to the 23d of *June* 1832, when the said deposit was returned: and if the Court should be of opinion that the Plaintiff was entitled to recover any further compensation for the loss of the use of the said 1500*l.* during the period last mentioned, the arbitrator found that the sum of 54*l.* 2*s.* 3*d.* would be properly payable to him in that behalf.

The question for the opinion of the Court was, whether the Plaintiff should retain the verdict; and if so, whether for the sum of 439*l.* 0*s.* 8*d.*; or for what other sum.

Thesiger for the Plaintiff, and *Talfourd* Serjt. for the Defendant, discussed and received the judgment of the Court upon each head of the charges separately.

Upon the first head, with respect to the 4*l.* 9*s.* 8*d.* incurred by the Plaintiff with his agent prior to the execution of the articles of purchase, and 10*l.* 10*s.* for the survey of the estate,

TINDAL C. J. said,—The expenses preliminary to the contract ought not to be allowed. The party enters into them for his own benefit, at a time when it is uncertain whether there will be any contract or not.

The charge for a survey must also be disallowed. It would have been prudent in the purchaser to defer the survey till he knew whether or not a title could be made out.

Upon the second head, *Thesiger* abandoned the claim of 16*l.* 9*s.* 4*d.* for the charges of preparing a conveyance, and 10*l.* 10*s.* counsel's fees thereon: and *Talfourd* objected to the charge of 7*l.* 12*s.* 6*d.* for the journey to *Stafford* to investigate title, and 6*l.* 17*s.* 2*d.* for searching for judgments, on the ground that the investigation (which could only be the comparing of deeds with the abstract), and the search for judgments, was made too early in the proceedings. The Plaintiff should not have incurred those expenses till he knew whether or not the Defendant could answer the objections to his title.

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TINDAL C.J. I think both these charges may be allowed. Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily; and, for the same reason, the comparison of deeds with the abstract should be made early.

Upon the third head, *Talfourd* objected to the payment of 194*l.* 4*s.* 11*d.*, the Plaintiff's costs as between attorney and client, *ultra* the costs as between party and party, taxed and paid to him in the suit in Chancery. In *Hathaway v. Barrow* (a) it was held, that in action for malfesance, whereby the plaintiff incurred costs in judicial proceedings, if there was an order of another court for the defendant to pay the costs of those proceedings to the plaintiff, he could neither recover, as special damage, the sum at which they were taxed, nor the extra costs as between himself and his attorney.

Sinclair v. Eldred (b), and *Jenkins v. Biddulph* (c), are to the same effect.

(a) 1 *Campb.* 151.
 (b) 4 *Taunt.* 7.

(c) 4 *Bingh.* 160.

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Thesiger, in support of the claim, relied on *Sandback v. Thomas* (a), where, in an action for maliciously holding the plaintiff to bail, he was held entitled, in the calculation of damages, to recover, not merely the taxed costs, but the costs as between attorney and client.

And in *Jones v. Dyke and Others* (b), — an action for the recovery of deposit money and damages upon the refusal of a vendor to complete a sale of an estate in *Wales*, — the plaintiff had a verdict by consent for the following charges, the Judge, *M'Donald* C. B., thinking them reasonable: — “costs of plaintiff’s solicitor, 47*l.* 19*s.* 4*d.*; journies to *London* and *Llandilo*, 21*l.*; journey to *London*, 15*l.* 15*s.*”

Sandback v. Thomas was not cited in *Jenkins v. Biddulph*: and in *Webber v. Nicholas* (c), *Best* C. J. thought *Sandback v. Thomas* right, although, as it was only a *nisi prius* decision, he could not adhere to it in opposition to decisions in *banc*.

There can be no reason, on principle, why a party should not be indemnified for all the lawful expenses he has incurred in a successful suit. In the present case, these extra charges are a damage to the Plaintiff consequential on the Defendant’s breach of contract. [*Tindal* C. J. If the Court of Equity had thought so, it would have ordered costs to be taxed as between attorney and client. *Bosanquet* J. Are not costs beyond taxed costs to be considered as incurred voluntarily, beyond what is absolutely necessary?] The extra costs here may be considered as one branch of the expense of investigating title, which, it has been decided, the Plaintiff has a right to recover.

TINDAL C. J. We all think that the extra costs in Chancery are not a damage which is a necessary con-

(a) 1 *Stark.* 306.

(b) *Sugd. Vend. & Pur. Append.* 8.

(c) *Ry. & Moo.* 419.

sequence of the breach of this contract. Every expense which is a necessary consequence of the breach of contract, ought to be allowed; but the filing a bill for enforcing a specific performance is one degree removed from a consequence of the contract, and the Plaintiff must take the consequences of the suit, as in other cases. Upon this principle, and in adherence to the cases cited for the Defendant, we think this claim ought not to be allowed.

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PARK J. I am of the same opinion. If the claim be allowed in this case, I do not see why, in all cases, a separate action should not be brought for costs which the officer of the Court disallows on taxation.

VAUGHAN J. concurred.

BOSANQUET J. I think the Plaintiff had his compensation in the costs allowed by the officer of the Court.

Upon the fourth head of charges, 45*l.*, for journies and expenses which it was reasonable and prudent for the Plaintiff to take and incur in negotiating the purchase and defending the Chancery suit, it appeared that some of the journies had been taken before the contract; the expense of them, therefore, was disallowed pursuant to the decision under the first head. So, likewise, as a result of the decision on the third head, was the expense of such of these journies as were undertaken in the course of the Chancery suit.

The fifth head of charges was not contested, and

Per Curiam, It ought to be allowed.

Judgment accordingly.

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Jan. 28. WEBB, Assignee of WALTER, an Insolvent, v.
WEATHERBY.

To a plea of payment of 3*l.* 8*s.* 2*d.* in satisfaction and discharge of Defendant's promise, Replication, that Defendant did not pay it in satisfaction and discharge, nor did Plaintiff receive it in satisfaction and discharge, Held, on demurrer, unobjectionable.

TO a declaration in *assumpsit* for goods sold, lodging provided by, and on an account stated with, the insolvent before his insolvency,

The Defendant pleaded, first, the general issue; and, secondly, as to the sum of 3*l.* 8*s.* 2*d.*, parcel of the sums in the declaration mentioned, that after the making of the promise in the declaration mentioned as to that sum, and before *Walter* became insolvent, to wit, on, &c., the Defendant paid *Walter* the said sum of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of the said promise by him, the Defendant, made in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by *Walter* by reason of the non-performance of the said promise as to that sum; and that *Walter* accepted, had, and received of the Defendant the said sum of 3*l.* 8*s.* 2*d.*, in full satisfaction and discharge of the said promise in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by *Walter* by reason of the non-performance of the same promise.

To the second plea, the Plaintiff replied, that the Defendant did not pay *Walter* the said sum of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of the said promise by the Defendant so made as aforesaid in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damages sustained by *Walter* by reason of the non-performance of the same promise as to that sum, nor did *Walter* accept, have, and receive of Defendant the said sum of 3*l.* 8*s.* 2*d.* in full satisfaction and discharge of the said promise in respect of the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by *Walter* by reason of the non-performance

of the same promise in manner and form as the Defendant had, in his last plea in that behalf, alleged.

The Defendant demurred, assigning for causes of demurrer, that the issue attempted to be raised by the replication was multifarious and complex, inasmuch as the replication had not merely denied that the Defendant paid *Walter* the said sum of 3*l.* 8*s.* 2*d.*, but also that *Walter* accepted, had, and received the same of the Defendant in full satisfaction and discharge of the said promise as to the said sum of 3*l.* 8*s.* 2*d.*, and of the damage sustained by the said *Walter* by reason of the non-performance of the same promise; both of which facts were material, and either of which would be sufficient to bar the Plaintiff from maintaining his action against the Defendant. And also for that both the said facts constituted two distinct and different propositions.

Joinder.

Chandless, for the Defendant, contended that the replication was ill. The Plaintiff, in an action of *assumpsit*, seeks to recover damages; and, in an action for damages, it may well be, that the Defendant has paid something, and yet that the Plaintiff has not accepted it in satisfaction of his entire demand, or *vice versa*. It is necessary, therefore, in such an action, for the Defendant to aver acceptance in satisfaction as well as payment; *Paine v. Masters* (a), *Drake v. Mitchell* (b) (*per Lawrence J.*); and both the payment and the acceptance being material allegations, the Plaintiff ought to elect on which of them he will tender an issue. In the case of unliquidated demands, acceptance of less than the entire claim in satisfaction of the entire claim, is an answer to the action; *Wilkinson v. Byers* (c); and a defendant may

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(a) 1 *Str.* 573.

(b) 3 *East*, 256.

(c) 1 *Adol. & Ell.* 106.;

3 *Nev. & Mann.* 853.

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be able, by letters or oral admissions, to prove the acceptance in satisfaction in cases where he may have no evidence to prove the payment in satisfaction; or he may be able to prove the payment only, and satisfaction may be implied from the conduct of the Plaintiff: the Defendant ought not, therefore, by any form of pleading, to be called on to establish both. The old books of entries always add to the allegation of payment, acceptance in satisfaction, from which it may be inferred that both allegations were deemed material; and replications to pleas of the delivery and acceptance of an article in accord and satisfaction of the plaintiff's demand, protest the delivery and traverse only the acceptance of the article in satisfaction. A departure from forms so long established will weaken the foundation and shake the whole fabric of the law of *England*.

Theobald, contra, was stopped.

TINDAL C. J. I hope the law of *England* will not be much disturbed if we overrule this demurrer. This is not a plea of accord and satisfaction, but of a payment received in satisfaction of the Plaintiff's demand; the receipt in satisfaction virtually implies that the payment was made in satisfaction; and I cannot see how the Defendant is injured by the Plaintiff's taking issue on the entire allegation. In *Peytoe's* case (a) Lord Coke says "*nota* reader, the best and most secure form of pleading of an accord is to plead it by way of satisfaction, and not by way of accord; for if he pleads it by way of accord, he ought to plead the precise execution thereof in the whole, and if he fails of any part thereof, his plea is insufficient; but by way of satisfaction he shall plead no more than that the defendant

(a) 9 *Rep.* 80. a.

paid the plaintiff 6*l.* 10*s.* in full satisfaction of the same action, which the plaintiff received," &c.: and in *Pinnell's* case (a) he says, that payment and acceptance before the day, of parcel, in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time. In *Young v. Rudd* (b) to *indebitatus assumpsit* on a *quantum meruit*, the defendant pleaded in bar, that he gave the plaintiff a beaver hat, which he accepted in satisfaction of the debt. The plaintiff replied by protestation, that the defendant did not give the hat in satisfaction, and traversed that he accepted it in satisfaction; and, upon demurrer, it was objected on the behalf of the defendant, that that was an immaterial traverse, because the giving was the directing matter, which ought to have been traversed, and not answered by protestation. To which the answer was, either the giving or the acceptance of what was given in satisfaction might be traversed.

If a denial of acceptance in satisfaction implies a denial of payment in satisfaction, it is at all events no more than surplusage to say that the money was neither paid in satisfaction nor received in satisfaction. Where a creditor receives without objection what is offered by his debtor, *solvitur in modum solventis*, and it must be implied the debtor paid it in satisfaction; where the creditor objects, *recipitur in modum recipientis*, and issue taken on the receipt in satisfaction, is impliedly an issue on the payment in satisfaction.

The rest of the Court concurred.

Judgment for Plaintiff.

(a) 5 Rep. 117. a.

(b) 5 Mod. 86.

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Jan. 30. HUMPHREY v. WODEHOUSE, GOMME, FISHER,
and STILLWELL.

A policeman
Defendant
who obtains
a verdict is
entitled to his
costs under
10 G. 4.
c. 44., not-
withstanding
the power
given to the
Judge to cer-
tify under
3 & 4 W. 4.
c. 42.

THIS was an action for an assault, in which a verdict was given for the Plaintiff against *Wodehouse* and *Gomme*; but the Defendants *Fisher* and *Stillwell*, being police officers, and having acted on the occasion as such, were acquitted by the direction of the Chief Justice, who certified, nevertheless, under 3 & 4 W. 4. c. 42., that the Plaintiff had sufficient ground for joining them in the action.

By that statute it is enacted, section 32., that "where several persons shall be made defendants in any personal action, and any one or more of them shall, upon the trial of such action, have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the judge before whom such cause shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action."

Busby obtained a rule, calling on the Plaintiff to shew cause why, notwithstanding the certificate of the Chief Justice, the Defendants *Fisher* and *Stillwell* should not have their costs pursuant to 10 G. 4. c. 44. s. 41., by which it is enacted, for the protection of persons acting in the execution of that act, amongst other things, that "if a verdict shall pass for the defendant, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant,

unless the judge before whom the trial shall be tried, shall certify his approbation of the action and of the verdict obtained thereupon."

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Wilde Serjt. and *Humphrey*, who shewed cause, contended, that the forty-first section of 10 G. 4. c. 44. must now be taken, subject to the judge's power to certify under 3 & 4 W. 4. That power was given without exception; and the act, which was passed to remedy the defects of 8 & 9 W. 3. c. 11., ought to receive a liberal construction.

Busby. It was not intended by 3 & 4 W. 4. to repeal the forty-first section of 10 G. 4. c. 44., but merely to extend to every form of action the provisions of 8 & 9 W. 3. c. 11., by which it is enacted, that "where several persons shall be made defendants to any action or plaint of trespass, assault, false imprisonment, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit, in like manner as if a verdict had been given against the plaintiff or plaintiffs and had acquitted all the defendants, unless the judge, before whom such cause shall be tried, shall, immediately after the trial thereof in open court, certify upon the record under his hand, that there was a reasonable cause for making such person or persons a defendant or defendants to such action or plaint." The power given, therefore, by 3 & 4 W. 4. must be exercised, subject to the exemptions created by 10 G. 4. c. 44.

TINDAL C. J. Upon reconsideration, and having the statutes now before me, I think that the act under which I gave the certificate, does not authorise it in such a case as this. It appeared to me at the trial, that the statute

1835. 3 & 4 W. 4., with very general words, *did* override the forty-first section of 10 G. 4. But I think, now, that the only object of the statute of W. 4. was to remedy the defects in the statute of W. 3.

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That act was imperfect in three respects. It applied only to certain specified forms of action; to cases where a verdict had been given; and to 40s. costs; whereas the new statute embraces personal actions of all kinds, extends to judgments upon demurrer as well as upon verdict, and gives all the costs the party incurs.

As these were the principal objects of the act, I think it cannot be held to repeal the intermediate act of 10 G. 4. The forty-first section of that act contains no exception; and I think we cannot engraft an exception into it from the general words of 3 & 4 W. 4.

PARK J. The 3 & 4 W. 4., was only passed to remedy the defects of 8 & 9 W. 3. and extend it to heavier costs, to every species of judgment, and to all personal actions. But the police act, 10 G. 4., stands on a very different footing: it applies to a particular class of men who are often placed in difficult and dangerous situations. The object was to afford those persons ample protection, by depriving the plaintiff of costs unless the Judge certifies his approbation of the action and verdict, and by giving the defendant, if successful, costs as between attorney and client.

We cannot hold, therefore, that this protection has been taken away by an act passed mainly to remedy defects in procedure.

VAUGHAN J. and BOSANQUET J. concurred.

Rule absolute.

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LEUCKHART v. COOPER and Another.

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UPON a rule to plead several matters in trover, the Court allowed the following pleas, considering them to be essentially different defences.

1st, The general issue.

2dly, A general lien by custom for up-town warehousemen, in respect of their general balance against any individual housing goods with them; and that the goods in question were housed at the Defendants' by one *Heilbron*, who was indebted to them on a general balance.

3dly, A lien against *Heilbron* by special agreement.

4thly, That the Plaintiff sent the goods in question to *Heilbron*, with such powers as to give him all the *indicia* of property; and that, therefore, the Defendants had a right to insist on the custom mentioned in the second plea, as against *Heilbron*.

5thly, The custom in the second plea, set up as applicable to a debt due to the Defendants from the Plaintiff.

Richards in support of the rule.

W. H. Watson, contra.

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BRIDGES v. FISHER.

Costs of commission to examine witness abroad, not allowed to the party who obtains the commission, although successful in the action, where the examination is more peculiarly for his benefit.

THE Plaintiff and *M'Donald* were commissioners for the distribution of certain military prize money.

The Defendant, who was *M'Donald's* clerk, was furnished with a list of the persons entitled to share in this prize money;

But, under the directions of *M'Donald*, he gave cheques for a portion of it to persons whose names were not in the list of claimants, and the Plaintiff became liable for the money so misapplied.

M'Donald having become bankrupt, the Plaintiff brought an action on the case against the Defendant, on the ground of his having improperly lent himself to the purposes of *M'Donald*, whereby the Plaintiff was injured.

After the action was commenced, and a few days before the declaration was delivered, *M'Donald* retired to *France*; whereupon

The Plaintiff, in his particulars of demand, having omitted to give credit for a considerable sum paid by *M'Donald*, the Defendant obtained a commission under 1 *W. 4. c. 22.* to examine *M'Donald* in *France*.

This examination was attended and conducted as well by counsel for the Plaintiff as for the Defendant.

The Defendant, however, did not give the minutes of it in evidence at the trial of the cause, the jury having found a verdict in his favour, apparently on the ground that he was *M'Donald's* clerk at a small salary, and had done no more than obey the directions of his employer. Under these circumstances,

Adams Serjt. obtained a rule *nisi* to refer it to the prothonotary, to tax the Defendant's costs of this commission.

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Wilde Serjt. and *Sir J. Claridge*, who shewed cause, contended that it was doubtful whether or not the minutes of *M'Donald's* examination could have been received in evidence for the Defendant, *M'Donald* being so directly interested in the result of the suit. As the minutes were never produced at the trial, and as it was manifestly for the advantage of the Defendant that *M'Donald* should not be exposed to a cross-examination in open court, the Defendant himself ought to defray the expense of the commission, the costs of which were, under the statute, in the discretion of the Court.

Adams and *Nicholl* in support of the rule, maintained that *M'Donald* would have been a competent witness; *Whytt v. M'Intosh* (a); that, by way of precaution, it was necessary the Defendant should be prepared with his testimony, particularly as to the sums which he had actually paid; and that, therefore, the expense of the commission ought, like the expense of any witness for the Defendant, to be defrayed by the losing party.

TINDAL C. J. It is unnecessary for us to discuss the question whether or not *M'Donald* would have been a competent witness for the Defendant, because this case may be decided by the clause of the statute which makes it discretionary in the Court whether they shall allow the costs or not.

The application is made under the statute 1 W. 4. c. 22. 1., and in the recital of that section may be

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seen the object of the legislature. Every one knows that before that act passed, a party who wanted the testimony of a witness abroad filed his bill in Chancery for a commission to examine him, and the cause was hung up till the suit in Chancery was at an end. It was therefore a great boon to the subject to enable him to avoid this expense and delay, by applying at once to the Court of law. That power is given by sect. 1. of the recent act, and, by a subsequent section, the costs of the commission are placed in the discretion of the Court from which it issues.

When we are called on to exercise that discretion, our first duty is to consider how the costs were paid before. Now in the Court of Equity, the party applying paid the costs himself; it was considered a sufficient advantage that he so obtained the testimony of a witness who must otherwise have been wanting to his cause. However, the question where the burthen shall fall, must ultimately depend upon the peculiar circumstances of each case.

Looking at the circumstances of this case, we think the Defendant had a great advantage in examining *M^r Donald* abroad, without bringing him publicly before a jury. The Defendant was *M^r Donald's* clerk; and the claim made against the Defendant arose out of *M^r Donald's* application of money with which he had been entrusted on the part of the Plaintiff. Without impeaching the conduct of the Defendant, it is clear there would have been a great bias on the part of *M^r Donald*, to shelter the person who had been instrumental to the misapplication of the money in question; and the knowledge of that bias might have operated unfavourably upon a jury. I think, therefore, the Defendant has already had a sufficient advantage in obtaining this evidence, without producing the witness

before a jury, and that we ought not to call on the other party to contribute to the expense.

PARK J. I am of the same opinion. This is a case in which the Court is not hampered in the exercise of its discretion. Before the recent statute, the party who sued out the commission incurred all the expense. And a main object of that act was, to give the Court a discretion as to costs. For the reasons given by the Chief Justice, I think the circumstances here are so ambiguous, that the costs ought not to be allowed.

VAUGHAN J. Under all the circumstances, I think this commission was a boon that the Defendant ought to pay for.

BOSANQUET J. concurred.

Rule discharged.

GEORGE v. ELSTON, EVELEIGH, and COOK.

Jan. 31.

IN trespass on the case for an excessive distress, the Plaintiff obtained a verdict against *Cook* with 45*l.* 10*s.* damages, but failed as to *Elston* and *Eveleigh*: whereupon,

Where a verdict was found against one of three Defendants, and in favour of the other two, the Court deducted the costs of the two out of Plaintiff's costs and damages against the one, without regard to Plaintiff's attorney's lien.

Wilde Serjt., upon an affidavit that the Plaintiff was unable to pay, obtained a rule *nisi* for the prothonotary upon the taxation of costs in this cause to deduct from the Plaintiff's damages and costs against *Cook*, 37*l.* 10*s.* the costs of *Elston* and *Eveleigh* in this action, and also 13*l.* 3*s.* costs due from the Plaintiff in respect of an action of trespass against *Elston* and *Eveleigh*, in which he had been *nonprossed*.

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Kelly, who shewed cause, objected to this, on the ground that it would interfere with the lien of the Plaintiff's attorney for his own costs.

In *Schoole v. Noble and Others* (a), where there were many defendants, and some went to trial and obtained a verdict, but others suffered judgment by default, the Court permitted the costs and damages on the *judgment by default* to be deducted from the costs taxed on the *postea* to those defendants who had a verdict; and held, that an attorney had only such a lien on the costs as was subject to the equitable claims of the parties in the cause. But it is doubtful whether the attorney's lien is so qualified; and in *Hall v. Ody* (b), Lord *Eldon* said the rule should be reconsidered. In *Mitchell v. Oldfield* (c), and *Randle v. Fuller* (d), the Court of King's Bench would allow no set-off of the costs of one cause against the costs of another, even between the same parties, to the prejudice of the attorney's lien. Here, the parties to the action of trespass are not the same as the parties to this action. In *Nunex v. Modigliani* (e), *O'Connor v. Humphrey* (g), and *Bourne v. Benett* (h), the set-off was allowed, but the parties were substantially the same. However, in *Mordecai v. Nutting* (i), the plaintiff sued four defendants, got a verdict against one, and the other three were acquitted. On an affidavit that plaintiff was an itinerant *Jew* and poor, the defendants who were acquitted obtained a rule to shew cause why their costs should not be deducted out of what the prothonotary should allow the plaintiff for costs against the defendant who was found guilty. On shewing cause the Court declared the motion to be unprecedented, and discharged the rule.

- (a) 1 *H. Bl.* 23.
- (b) 2 *B. & P.* 28.
- (c) 4 *T. R.* 123.
- (d) 6 *T. R.* 456.

- (e) 1 *H. Bl.* 217.
- (g) 1 *H. Bl.* 657.
- (h) 4 *Bingh.* 423.
- (i) *Barnes*, 145.

That is expressly in point, and the general rule of *Hil. 2 W. 4.* (93.) provides that "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

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Wilde. The attorney's lien under that rule has always been considered subject to the equitable rights between the parties. *Schoole v. Noble* and *Nunex v. Modigliani*, therefore, are in point for the Defendants. As for *Mordcaei v. Nutting*, it is answered by *Roberts v. Biggs* (a) in the next page: and there is an affidavit here that the Plaintiff is unable to pay.

TINDAL C. J. I think the rule of *Hil. 2 W. 4.* applies to cases where there is a cross claim for costs in separate actions. In this cause the two Defendants who make the application are brought into Court by the Plaintiff, and the verdict being in their favour, I see no reason why they should not have their costs. *Schoole v. Noble* is in point.

Rule absolute as to setting off 37l. 10s., the costs of *Elston* and *Eveleigh* in this cause.

(a) *Barnes*, 146.

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TROTTER v. BASS.

A Judge has no jurisdiction to amend the indorsement on a writ of summons.

THE writ of summons in this case was originally indorsed for the recovery of 25*l.*, but with a view to send the cause before the under-sheriff, the Plaintiff, by order of a Judge at chambers, amended the indorsement by substituting 15*l.* for 25*l.*

Sewell obtained a rule *nisi* to rescind this order, on the ground that the Judge had no jurisdiction to amend the indorsement on the writ; and

The Court being of that opinion, the rule was made
Absolute.

Talfourd Serjt. shewed cause.

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GREEN v. GLASSBROOK.

Money paid into Court in lieu of bail, but under a protest against the sufficiency of the affidavit to hold to bail, will not be paid out of Court to Defendant on the ground of the insufficiency of the affidavit.

THE Defendant, upon being arrested, paid into Court the amount of the debt, and 20*l.* in lieu of putting in special bail, pursuant to 7 & 8 G. 4. c. 71., but protested at the same time against the sufficiency of the affidavit to hold to bail, and

Taddy Serjt. obtained a rule *nisi* for the Defendant to take the money out of Court, on the ground of a defect in that affidavit.

the ground of the insufficiency of the affidavit.

Wilde Serjt. shewed cause. The statute 7 & 8 G. 4. c. 71. enacts, s. 2., that "in all cases where any defendant shall have been arrested, and shall have given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such defendant, instead of putting in and perfecting special bail, to deposit and pay into court the sum indorsed upon the writ, together with the amount of the king's fine, if any, upon the original writ, and a further sum of 20*l.* as a security for the costs of the action, there to remain to abide the event of the suit; and thereupon the said defendant may, and he is hereby required to enter a common appearance, or file common bail in the action, within such time as he would have been required to have put in and perfected special bail in the action according to the course of the said court." The Defendant, therefore, after paying the money into court, must be taken to stand in the same situation as if he had put in and perfected special bail, and had entered an appearance. In such case it is too late to object to the sufficiency of the affidavit to hold to bail.

Taddy. As the Defendant has no option given him, but is *required* to enter an appearance, it could not have been the intention of the legislature to divest him of the power of making objections which, but for appearance, he would be entitled to make. At all events, he is entitled to make them in this case, having paid the money under a protest.

TINDAL C. J. This statute is very beneficial to Defendants; it imposes no duty on them, but gives them an option instead of putting in and perfecting special bail, to pay into court the sum indorsed upon the writ, together with the amount of the king's fine, if any, and 20*l.* as a security for costs, upon entering a common

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appearance within such time as they would have been required to put in and perfect special bail.

The Defendant in this case has made his option; instead of putting in and perfecting special bail, he has paid into Court the sum required; he must take that act with all its consequences; and among others, the consequences of having entered an appearance.

Rule discharged.

Jan. 31.

SOUTHGATE and Others, Executors of THOMAS CLARK, v. CROWLEY and Another.

The circumstance, that an executor has commenced and conducted an action properly, is not sufficient to exempt him from costs, if he fails.

A VERDICT having been given in favour of the Defendants in this cause,

Atcherley Serjt. obtained a rule *nisi* calling upon them to shew cause why the Plaintiffs should not under 3 & 4 *W. 4. c. 42.*, be exempted from the payment of costs.

The action was brought by the Plaintiffs to recover a balance of 917*l.* 18*s.* 10*d.* which they alleged to be due from the Defendants for the use of a waggon and three horses hired by them of the testator *Clark* at various intervals from 1827 to 1833; of a cart and two horses hired at intervals from 1829 to 1833; and for cartage done by *Clark* for the Defendants between 1826 and 1833.

Clark died in 1833, having appointed the Plaintiffs his executors.

In support of the present application the Plaintiffs' attorney deposed that, from the examination of *Clark*'s books and bookkeeper, he believed the Defendants to be indebted to *Clark* to the amount of 917*l.* 18*s.* 10*d.*

That he applied to the Defendant *Crowley* for the amount, when *Crowley* stated that he owed *Clark* no more than 535*l.*, and objected to pay more, but refused

to disclose the nature of his objection, referring applicant to Defendants' attorney, who declined in like manner to give any reason for the refusal to pay.

That a tender of 535*l.* was afterwards made to the Plaintiffs; but the party making it refused to disclose the nature of the Defendants' objection to pay more, except that *Clark* had agreed to pay the wages of the men who drove the waggon and cart.

That at the trial an offer made by the Plaintiffs to refer to arbitration all matters in difference, was refused by the Defendants; that the Defendants then admitted that the cartage charged for, had been done, and that the charges were correct; also, that the waggon and horses, and cart and horses, had been employed by them for the time alleged: but they called a witness who proved that *Clark* had expressly agreed to furnish two horses for the cart, and charge for one only, whereupon the balance which but for such agreement would still have been in favour of the Plaintiffs, being turned against them, the verdict was found for the Defendants.

That the Plaintiffs were wholly ignorant that *Clark* had made any such agreement, and that the deponent would not have advised them to proceed if the Defendants' attorney had informed him they were in a condition to prove it.

Upon production of *Clark's* books at the trial it appeared that, for a period of three years, a blank was left for the amount of the charge in respect of the cart and horse: and *Clark's* servants were called to establish a *quantum meruit*.

The Plaintiffs had had the assistance of an accountant before commencing the action; and the Defendants had refused to say, whether or not there was any agreement in writing.

Wilde Serjt. appeared to shew cause: when the Court observing, that as a general rule executor-plaintiffs were

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now bound, where the verdict goes against them, to pay costs; that the *onus* of making out an exception was cast on them; and that there did not appear in the present case to have been any misconduct on the part of the Defendants; called on

Atcherley, and *Hayes* with him, to support the rule. They contended, that the ground on which executors were formerly exempted from costs, was the difficulty they lay under of knowing what was the contract of their testator. *Hayworth v. Davies* (a), *Bull v. Palmer*. (b) And the Court ought to exercise its discretion under the new act with a view to that principle. Here, the Plaintiffs had discharged a duty cast on them by law, and had discharged it in an unobjectionable manner, proceeding with due caution, and calling in the aid of an accountant; but they could not reasonably have anticipated that a contract for supplying three horses would turn out to be a contract for supplying one of them without any charge: they ought not, therefore, to be subjected to costs which they might have to pay *de bonis propriis*, while, on the other hand, if they had omitted to sue they might have been liable for a *devastavit*. In *Wilkinson v. Edwards* (c), the administrator commenced the action with temerity, and prosecuted it recklessly, occasioning the defendant a great deal of unnecessary expense. Here no blame attached to the Plaintiffs; and the Defendants had been the occasion of all the expense by refusing to say what their agreement with the testator was. Some precise rule ought to be laid down for the exercise of the discretion of the Court.

TINDAL C. J. This question comes before us on the construction of the statute 3 & 4 W. 4. c. 42., by which it is enacted, "that, in every action brought by any

(a) *Cro. Jac.* 429.

(b) *T. Jones*, 47.

(c) 1 *New Cases*, 301.

executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a judge of any of any of the superior courts shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff; and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for costs, and they shall be recovered in like manner."

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According to the general rule, therefore, established by that act, an executor, when unsuccessful, is liable to costs; his occasional exemption is an excepted case, and, like other exceptions, must be made out clearly. Before the recent act, when executors sued in right of their testator, they were not liable to costs although they should fail in their action. I had always thought that this arose, not from express exemption by any law, but owing to the particular mode in which the language of the statutes giving costs to a defendant is expressed. By 23 H. 8. c. 15. s. 1., costs are given to a defendant where the plaintiff is nonsuited, or a verdict passes against him, in actions on contracts *immediately* with, or for wrongs *immediately* done to, the plaintiff. That statute was extended to all personal actions by 4 Jac. 1. c. 3.; which being framed on the model of 23 H. 8. c. 15., it was held, that executors and administrators are neither within the one nor the other, inasmuch as the contract on which they sue is not made immediately with themselves, but with their testator or intestate. And certainly this was no new doctrine of mine; for in *Tattersall v. Groote* (a), Lord Eldon says, "on a review of the cases, we think that

(a) 2 B. & P. 253.

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the sound doctrine to be collected from them is, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to the payment of costs, though the cause of action arose after the death of the testator or intestate. This doctrine seems to be founded on the act of parliament of which all the cases are an exposition, namely, the 23 H. 8. c. 15. Attending to the language of that act, perhaps we may be authorised to say, that the sound principle on which the exemption of executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie; but that the exemption founds itself on the description of the actions contained in the statute by which costs are to be paid." And though cases have been cited of an earlier date in which the practice is ascribed to a different cause, yet the modern doctrine is that which I have pointed out, and results from a view of all the decisions.

However, it is not very material to enquire what was the origin of the rule; it was found to be clearly a grievance which the late statute was passed to remedy. For no good reason could be assigned for making a difference between executors and other parties to suits. When the defendant succeeds against an ordinary party he is entitled to his costs: and if the general rule, *Victus victori in expensis condemnandus est*, is sound, it is for the executor to shew the special circumstances under which he is to be excepted from the operation of the rule. One occasion for the exercise of the discretion of the Court in favour of the executor, no doubt would be, where having proceeded with every caution, he has been led on to incur the expense of a trial by misrepresentation or deception in the adverse party. But such is not the fair result of the evidence in this case. The action is brought for a specific sum claimed in respect of an alleged contract between the

testator and the Defendants for the hire of a waggon and three horses, a cart and two horses, and on a demand for jobs.

It is evident from the nature of the demand, that the executors proceeded on the supposition of some express contract; but they produced none at the trial; and if they had consulted the testator's clerk, he would have informed them, that so far from there being any express contract, a blank was left in the testator's books in respect of the amount due for hire, during a period of three years: upon that, any lawyer would have told them that their case rested entirely upon a *quantum meruit*; and yet they called no witness but the testator's servants. They therefore sued on a *quantum meruit*, without having prepared themselves with that species of evidence which would have rendered success probable.

I do not blame them: perhaps they were placed in difficult circumstances: but has there been any thing in the conduct of the Defendants to entitle the Plaintiffs to say, that upon this occasion they ought to be excepted from the general rule respecting costs? It is said, the Defendants refused to disclose the nature of their defence. I should be sorry if a defendant could be called on to disclose it, except, perhaps, where he has a testator's receipt in his pocket, or the question turns upon the production of a forged instrument.

Looking at the whole of the evidence, I see no ground for the Plaintiffs alleging they were taken by surprise, and I think they have not shewn any cause for their being exempted from the operation of the general rule.

PARK J. This being the last day of term, I shall only add my entire concurrence in what has fallen from his Lordship. It is impossible to lay down, as the Plaintiffs' counsel requires, any precise rule for the exercise of the discretion of the Court. It must depend

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upon the circumstances of the particular case. As a general rule the recent act intended to put executors on the same footing as other parties; and there is no reason why they should stand on a different footing. In *Wilkinson v. Edwards*, which I continue to think a right decision, there was great misconduct on the part of the executor: but though the present action were never so properly conducted, that is not the sole question; another question to be considered is, whether the Defendants have done any thing to deprive themselves of their general right to costs. Giving the Plaintiffs credit for meaning to act fairly by the testator's estate, it is but just that the estate should defray the Defendants' costs if the Defendants are exempt from blame. But I am not prepared here to say that the Plaintiffs, though they acted *bonâ fide*, proceeded with due caution; and I think the Defendants could not be expected to disclose the nature of their case.

VAUGHAN J. It is my misfortune to differ from the rest of the Court. The payment of costs by an executor being now left in the discretion of the Court, the first question I put is, "Was it the duty of the executor, with reasonable caution, to present this case to the jury?" If it was, he ought to be protected. Otherwise, in what situation is an executor placed!—liable to costs *de bonis propriis*, if there be not sufficient assets to defray them. And this is one of the class of cases in which I think a defendant should disclose the nature of his defence; for the parties litigant are not upon equal terms; and if the defendant refuses, he ought not to complain if the Court in the exercise of its discretion declines to call on the executor to pay his costs. Here, upon looking at the testator's accounts, the executors had a *primâ facie* case which they could not abandon without going before a jury, and they would

have obtained a verdict if the Defendant had not shewn a special contract, of which the Plaintiffs could have no knowledge. In *Wilkinson v. Edwards*, the executrix commenced the action with temerity, and prosecuted it recklessly, so that the case has no resemblance to the present.

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BOSANQUET J. I concur with my Lord and my Brother *Park*. Upon whatever grounds an executor has been exempted from costs heretofore, I am of opinion that, by the last act, he is placed in the same situation as any other party, unless he makes out, affirmatively, a case for the interposition of the Court. And I do not think the mere circumstance of his commencing the action *bonâ fide* sufficient; for if that had been the intention of the legislature, the act would have been framed differently, and the Court would have been directed to order the payment of costs, if the action were improperly commenced. My opinion turns on this,—that as the act stands, the executor must shew a special ground for exemption. The only thing that struck me, in the first instance, in this case was, that the Defendants, being asked for 917*l.*, did not state the ground of their refusal to pay. But they admitted what was due, paid it into court, and their calculation was found to be correct. As to their refusing to disclose whether or not the agreement on which they relied was in writing, I can very well conceive they might be under a difficulty as to the prudence of giving an answer. Something might depend on books of account,—something on oral testimony; and they could not be called on to narrow their defence.

When their case comes into Court, it stands now on the same footing as any other; and the Defendants, having succeeded, are entitled to their costs.

Rule discharged.

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ROUX v. SALVADOR.

Hides insured from *Valparaiso* to *Bordeaux* free of particular average, unless the ship were stranded, arriving at *Rio Janeiro* on

their way to *Bordeaux*, in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at *Rio*. The ship was stranded on her passage from *Rio* to *Bordeaux*.

The assured received the news of the damage to the hides and of their sale, at the same time:

Held, that the stranding was not such as to make the underwriter liable

for an average loss; and that the assured could not recover as for a total loss, without abandonment.

THIS was an action of *assumpsit* upon the policy of insurance hereinafter mentioned, which had been subscribed by the Defendant for 200*l*. The Defendant pleaded the general issue: and upon the trial before *Tindal C. J.*, *London* sittings after last *Hilary* term, the jury found a verdict for the Plaintiff for the sum of 27*l*. 15*s*. 6*d*., subject to the opinion of the Court on the following case:—

The policy on which the action was brought, was effected on goods per the *General La Fayette*, and other ship or ships, at and from, among other ports or places in the *Pacific Ocean*, *Valparaiso*, to any port or ports in *France* and the United Kingdom of *Great Britain*; with leave to call, touch, and trade at any port or ports, place or places, bays, rivers, and settlements in *America* or any where else; to effect all transshipments; and including the risk of crafts to and from the vessel or vessels. The usual perils were insured against; and the policy, which was for 700*l*., had the following memorandum subscribed:—“N. B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under 5 per cent.; and all other goods; also the ship and freight are warranted free of average under 3 per cent., unless general, or the ship be stranded.” The policy was declared to be on goods, specie, or bullion, as interest might appear: to pay average on

14 of L Cas 520: 526
34 of L Cas 702

2 L. R. C. P. 215.
5 — 352.
6 - HL 127

each species of goods by following landing numbers of the value of 100*l.* each, as if separately insured: cocoa and hides free of particular average, unless the ship were stranded: in case of average on the hides, the assurers were to pay the expense of washing and drying in full.

The Plaintiff, on the 6th of *May* 1831, caused to be shipped on board the ship *Roxalane* at *Valparaiso*, for *Bordeaux* in *France*, 1000 salted hides, marked X, of the value of 1117*l.* his property, which hides were intended to be insured by the said policy, and were duly declared thereupon, and a bill of lading duly signed by the captain in the ordinary form: 5926 other hides were also shipped on board the same vessel for the same voyage. The *Roxalane* being sea-worthy, and having the hides on board, departed on her voyage from *Valparaiso* on the 13th of *May* 1831, for *Bordeaux*; and on the 5th of *June* following, in the course of her voyage, meeting with bad weather, sprung a leak, in consequence of which, it was found necessary for the safety of the ship and cargo, to put into *Rio Janeiro*, being the nearest convenient port, for repair; at which port she arrived on the 7th of *July*. The whole of the cargo was then landed, and the 1000 hides were sold for the gross sum of 273*l.*, under circumstances stated in evidence taken at *Rio Janeiro* on interrogatories. From that evidence it appeared, that the hides upon their arrival at *Rio Janeiro*, were in a state of incipient putrefaction, occasioned by humidity in the bottom of the vessel; they were all, as it is termed, *greased*, the hair coming off in the fingers of those who handled them, and had they been reshipped, the captain must have thrown them overboard before his arrival in *Europe*, on account of their extreme putridity.

The said ship *Roxalane* being repaired and the leak stopped, she sailed, on the 23d of *July* 1831, from *Rio Janeiro* without the said 1000 hides, but with such part

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 ——— *Bordeaux*. And in the course of her voyage from *Rio*
 Roux *Janeiro* to *Bordeaux*, the ship was stranded at the en-
 v. trance of the River *Garonne*, on the 29th *September*
 SALVADOR. 1831. But the portion of the cargo not sold at *Rio*,
 was delivered without damage at *Bordeaux*.

The question to be decided was, whether the under-
 writer was liable for the loss on the hides. If the Court
 should be of that opinion, the verdict was to stand for
 27*l.* 15*s.* 6*d.*, being 88*l.* 14*s.* 4*d.* *per cent.* on the sum of
 1117*l.* the value of the 1000 hides.—If not, a nonsuit
 was to be entered.

This case was argued in *Trinity* term, by *Maule* for
 the Plaintiff, and *Coleridge* Serjt. for the Defendant:
 and a second time in this term, upon the question of
 abandonment.

Argument for the Plaintiff. 1st. This was a total
 loss; or, 2dly, if a partial loss, the ship was stranded,
 and the underwriter's exemption from partial loss is
 therefore, by his own contract, rescinded.

1. A loss may be predicated as total, where, by a peril
 insured against, goods are prevented from arriving at
 the destination appointed by the insurer. *Dyson v.*
Rowcroft (a). There, in the course of the voyage, fruit
 insured was so much damaged by sea water, that it
 became rotten, and stank; and on the ship's arrival
 at an intermediate port, into which she was driven, the
 government of the place prohibited the landing of the
 cargo: the ship also being too much damaged to
 proceed on the voyage, was sold, and the cargo neces-
 sarily thrown overboard; and it was held, that the
 assured were entitled to recover for a total loss. See
 also *Emerigon c. 12. s. 46*.

(a) 3 *B. & P.* 474.

Here, the hides could never have arrived at *Bordeaux*, their place of destination; they must have been thrown overboard, or have arrived in a state of decomposition, and not as hides. And the underwriter is not the less liable, because, ultimately, there may be a salvage: *Manning v. Nunham*. (a) In *Anderson v. Wallis* (b), *Hunt v. Royal Exchange* (c), and *Glennie v. London Assurance Company* (d), the goods were not of a perishable nature, and might have been transmitted to their destination. But in *Burnett v. Kensington* (e), Lord *Kenyon* said he could not subscribe to the *dictum* of Lord *Mansfield* in *Cocking v. Fraser* (g), "that if the commodity specifically remain, the underwriter is discharged."

And the loss in the present case being actually, and not merely constructively, a total loss, abandonment was not necessary; *Mellish v. Andrews*. (h) The hides upon arriving at *Rio*, being no longer fit to be used as hides, were necessarily sold, and so, put out of the power of the underwriter. If the hides had continued to subsist as hides, if there had been any *spes recuperandi*, it may be conceded abandonment would have been necessary; but after decomposition has commenced, a perishable article may be considered as destroyed. It may be urged that as abandonment is necessary when an adventure is put in great peril, it is also necessary where there is a total loss of the adventure to the assured, if any thing be rescued from destruction; that abandonment, which must be prompt where the thing insured continues to subsist, must be equally prompt where it has been converted into money. But that argument proves too much; for if a ship were dashed to

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(a) 3 *Dougl.* 130. *Park Ins.* 260. 2 *Campb.* 624. n.

(b) 2 *M. & S.* 246.

(c) 5 *M. & S.* 47.

(d) 2 *M. & S.* 371.

(e) 7 *T. R.* 222.

(g) *Park Ins.* 181.

(h) 15 *East*, 13.

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pieces, it is clear that abandonment would not be necessary, even though the timbers should afterwards be sold. It is, indeed, a common practice to abandon such a salvage; but this is merely as a matter of courtesy, for the assured may either keep the salvage, or bring his action as for a total loss. Here, the news of the loss, of the sale, and of the payment to the assured, arrived at the same time, so that there was nothing to abandon; nothing of which the underwriter could avail himself; and the adventure was lost to the assured. In *Mullett v. Shedden (a)*, where an *American* properly licensed to export saltpetre from *Calcutta* to *America*, having insured it for the voyage, the ship was seized by the captain of a *British* ship of war at the *Cape of Good Hope*, and the cargo condemned, unshipped, and sold by order of the Court of Admiralty there, which sentence was afterwards reversed by appeal here, and the property ordered to be restored, or its value paid to the owner, it was held, that the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the *Cape*, under the order of the court there. So in *Cambridge v. Anderton (b)*, it was held that where a ship was so much injured by the perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured might recover for a total loss without giving notice of abandonment. In *Doyle v. Dallas (c)*, where a ship being wrecked, was sold by the owner and master, and soon after got off by the purchaser, and repaired, though at a great expense, it was held, in effect, that the owner might treat it as a total loss, if the sale at the time, in the exercise of a sound judgment, appeared most beneficial to all parties. In *Hodgson v. Blakiston (d)*,

(a) 13 *East*, 304.(b) 2 *B. & C.* 691.(c) 1 *M. & Rob.* 48.(d) *Park Ins.* 281. n.

and *Martin v. Crockatt* (a), where it was held there ought to have been an abandonment, the thing insured was still in existence, and in *Bell v. Nixon* (b), the ship was not sold at the time the news of the loss arrived. In *Allwood v. Henckell* (c), the plaintiff could only have recovered the difference between the loss and the sum he had received, whether the loss were considered a total or a partial loss: he had no interest, therefore, in contesting the question of abandonment.

But if the Court hold the loss in this case to be a partial, and not a total loss, then the underwriter is rendered liable by the stranding before arrival at *Bordeaux*. The liability to average loss is here dependent on a condition, — the condition that the ship be stranded, — and if the condition be fulfilled, the liability attaches. A condition must be taken strictly; and the assured having thought fit to impose it, it is immaterial whether it be connected with the loss or not. In *Burnett v. Kensington* (d) where the insurance was effected on fruit, and the policy contained the usual memorandum, “Corn, fruit, &c., warranted free from average, unless general, or the ship be stranded,” the ship having been stranded in the course of the voyage, the underwriters were held liable for an average loss arising from the perils of the seas, though no part of the loss arose from the act of stranding.

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Argument for the Defendant.

First, as to the stranding. That is, no doubt, a condition, in the event of which the assured stipulates that the underwriter's liability shall attach. But the condition, though construed strictly, must be construed according to the intention of the parties. And the parties

(a) 14 East, 465.

(c) Park Ins. 280.

(b) Holt's N. P. C. 423.

(d) 7 T. R. 210.

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must be taken to mean a stranding in the course of the adventure. A stranding which takes place *before* the goods are put on board, could not be contended to be within the meaning of the parties: if so, why should a stranding after the adventure has terminated? Here the Plaintiff's adventure in respect of the hides was terminated at *Rio*, although the voyage of the ship was not at an end till she arrived at *Bordeaux*. In *Burnett v. Kensington*, the adventure as to the fruit was not terminated when the ship was stranded; and though in *Nesbitt v. Lushington (a)*, Lord *Kenyon* said, "where a ship is stranded, the underwriters agree to ascribe the loss to the stranding," yet in order that they should so ascribe it, the stranding must take place in the course of the adventure.

And, secondly, this was a partial, not a total loss, although it is difficult to reconcile all the authorities. In order to style it a total loss, the earlier cases required an actual destruction of the thing insured; but, even according to later decisions, if the thing insured continue to subsist in specie, the loss is only an average loss, notwithstanding the damage sustained be irretrievable. Here the hides arrived at *Rio* in specie; and if the assured had taken proper precautions, as by tanning them, might have arrived at *Bordeaux*. If they had arrived at *Bordeaux* in the state in which they arrived at *Rio*, it never could have been contended that the loss was total, when the thing insured was still in existence; and that principle, which seems a sound one, does not rest on *Cocking v. Fraser* only, but on *Mason v. Murray (b)*, where peas had arrived at the place of destination, but being much damaged, the produce of them was less, by about three fourths, than the freight, which, on account of the ship's arrival at the port of

(a) 4 T. R. 787.

(b) *Park Ins.* 191.

discharge, became due. The defence set up by the underwriter was, that if the goods mentioned in the memorandum arrive at the market, the underwriters are not liable, though a loss, amounting to a total one, may have happened; and, under the direction of Lord *Mansfield*, the jury found for the defendant. In *Dyson v. Rowcroft*, there was a total physical loss, by the article being thrown overboard; and the authority of *Manning v. Nunham* is much shaken by the decision in *Glennie v. London Assurance Company*. On the other hand, in *Thompson v. Royal Exchange Assurance Company* (a), where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the insured, it was held that the underwriters on the goods, who were freed, by the policy, from particular average, could not be made liable, as for a total loss, by a notice of abandonment. And Lord *Ellenborough* said,—“All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average, may as well be struck out of the policy. We can only look to the time when the loss happened, and the goods were landed; and then it was not a total loss, however unprofitable they might afterwards be.” That decision is confirmed by *Glennie v. London Assurance Company*, *Davy v. Milford* (b), *Headburg v. Pearson* (c), *M'Andrews v. Vaughan*. (d)

At all events, if the loss be deemed total, there ought to have been an abandonment; for this was at the utmost a constructive, not an actual total loss; and the facts which constitute it a constructive loss are not al-

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(a) 16 *East*, 214.(c) 7 *Taunt.* 154.(b) 15 *East*, 559.(d) *Park. Ins.* 185.

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tered by the circumstance that the news of the loss and of the sale arrived at the same time. An abandonment is necessary where any portion of the adventure remains; and it should be made promptly, in order that the parties may know their respective rights. Here the hides remained the property of the assured till they were sold; the money obtained by the sale represents the goods; the property in that money is not changed by the assured's commencing this action; and their mere demand in respect of a total loss does not supply the place of a formal abandonment. In *Parmeter v. Todhunter* (a), Lord *Ellenborough* says the word *abandon* must be used. In *Manning v. Nunham*, according to the report in *Douglas*, there was an abandonment; in *Allwood v. Henckell* where after a recapture the ship was sold under a decree of a Vice-Admiralty Court, Lord *Kenyon* inclined to think that an abandonment was necessary. In *Hodgson v. Blakiston*, where the ship and cargo were sold, it was held necessary. In *Read v. Bonham* (b), under the same circumstances, notice of abandonment was given. In *Mullett v. Shedden* no abandonment was necessary, because the loss was total at the time; but in *Martin v. Crockatt*, where the ship and cargo were sold for the benefit of all concerned, it was held there ought to have been an abandonment. *Bell v. Nixon* is in favour of the Defendant; and the authority of *Cambridge v. Ander-ton* is much weakened by *Gardener v. Salvador* (c) where *Bayley J.* said, he did not know of such a loss as loss by sale.

In reply, it was insisted that the only test by which the Court can determine whether or not abandonment be necessary, is, the continuance or conclusion of the adven-

(a) *Park Ins.* 281.

(b) 3 *Brod. & Bingh.* 147.

(c) 1 *Mood. & Rob.* 116.

ture. If the adventure be concluded, as it was here, at *Rio*, abandonment is unnecessary even though a portion of the thing insured may subsist in specie.

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TINDAL C. J. Upon the argument before us, the Plaintiff has contended that he is entitled to recover, either for *an average loss* on the hides, upon the ground that there has been a stranding of the ship within the meaning of the policy, so that the warranty as to hides being free from particular average may be considered as altogether struck out of the policy; or, for *a total loss*, with benefit of salvage to the underwriters, on the ground that the loss is in its nature total. The Defendant on the other hand contends, that the loss proved at the trial is an average loss only, and that the stranding of the ship under the circumstances, and at the time stated in the case, cannot have the effect of opening the warranty; and the Defendant further contends, that even if the loss is to be considered as a total loss, the Plaintiff cannot recover it for want of an abandonment. The three questions, therefore, which have been discussed upon argument before us are these:—First, Whether there has been such a stranding of the ship as to entitle the assured to claim and recover an average loss. Secondly, If no such stranding has taken place, then, whether the loss can be considered to be a total loss. And, Thirdly, Admitting the loss to be total, whether an abandonment was necessary in order to enable the Plaintiff to recover. And upon these three points we proceed to give the opinions at which we have arrived.

The facts which relate to the stranding of the ship are shortly these:—The hides in question were shipped on board the *Roxalana* at *Valparaiso*, for *Bordeaux* in *France*. The ship sailed from *Valparaiso* on the voyage

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insured, on the 13th of *May* 1831, and was taken into *Rio*, in consequence of stress of weather, on the 7th of *July*. The hides insured were sold at *Rio*, such sale being necessary for the benefit of all concerned; and, after the sale, the ship being repaired, departed on the 3d of *October* on her voyage to *Bordeaux*, not having any part of the hides insured on board, and was stranded at the entrance of the *Garonne* on the 29th of *December*.

The stranding of the ship, therefore, took place during the voyage which was described in the policy, but not until after the hides had been landed, and after the whole of the assured's adventure, and the whole of the risk of the underwriter upon the hides, that is, in effect, after the whole of the voyage insured, had been determined and ended, by the act of the assured. And, under these circumstances, we think there is neither principle nor authority upon which it can be held that the subsequent stranding of the ship satisfies the condition upon which the warranty in the policy depends.

The general principle laid down in *Burnett v. Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed: the policy, after the stranding, must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place, in order to produce such effect. Now, every other clause in the policy relates to the voyage insured, and to that alone: the liability of the underwriter on goods commences with the putting them on board, and ceases upon their being discharged and safely landed, or with any other legal termination of the adventure. The clause in question, therefore, as it appears to us, ought to be construed with the same restriction; and the stranding, which is made the condition of letting in an average loss, ought, upon the ordinary rules of con-

struction, to be considered to mean a stranding which takes place after the adventure has commenced, and before it has terminated. If the ship should be stranded (according to the legal construction of that word) in the harbour where she was lying for the purpose of receiving the goods, but before she takes the goods on board, that is, before the policy attaches, or the adventure commences; and, after the loading, the ship should sail, and an average loss be sustained; it would surely be unreasonable to contend, that the exception or condition of the warranty should have an operation, before the policy, that is, the warranty itself, has attached. And a much greater difficulty opposes itself to the position that the stranding, after the policy is at an end, shall have any operation on the clause of warranty. Indeed, there is no more reason why a stranding which takes place in a part of the voyage described in the policy, but at a time subsequent to the termination of the risk on the policy, should be deemed a stranding within the meaning of the parties, than a stranding upon a subsequent voyage altogether distinct from that named in the policy.

Again, the rights of the parties, the assured and the underwriter, were fixed and determined at the time of the sale at *Rio*. The loss was then, either a total loss with benefit of salvage, or an average loss. There is an end of any contingency, because the voyage is over which is the subject of the risk. We think, therefore, it would be a forced construction of the policy, not consistent with the ordinary rules of interpretation, and certainly not sanctioned by any decided case, to hold that the stranding in the *Garonne* in the month of *December* can affect the nature of the loss upon hides, which were unshipped and sold in the course of the voyage in the *July* preceding.

As to the second question, whether the loss upon the

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hides is a total loss, we are all of opinion that upon the evidence stated in the case, the loss is a constructive total loss. For we take the necessary inference to be drawn from that evidence to be, that in consequence of damage from the perils of the sea, one of the perils insured against, it became impracticable to carry the hides, in specie, to the termination of the voyage for which they were insured; and that if it had been possible to have taken them to *Bordeaux*, they would have arrived in a state of putridity, having altogether lost the character of hides. We do not hold the loss to be total, upon the ground, that the hides, if carried to *Bordeaux*, would have arrived in so bad a state, that they would have sold for less than the freight and expenses, or would have been altogether unsaleable there; that state of circumstances might not be sufficient to make a constructive total loss where the underwriter has guarded himself from being answerable for average losses by a special clause in the policy: but we hold it to be total on the ground—and that ground only—that upon the evidence they never could have arrived as hides at all. The present case appears to agree so nearly with that of *Dyson v. Rowcroft (a)*, that no sound distinction in this respect can be made between them. And the judgment given by Lord *Alvanley* appears to us to govern the case now under discussion. “Unless,” says Lord *Alvanley*, “the consequence of the damage sustained, be the total loss of the commodity, the underwriter does not agree to be answerable; but if the commodity be totally lost to the assured, he undertakes to pay;” and afterwards, discussing what is a total loss, he says, “the commodity here was in such a state that it could not be suffered to remain on board consistently with the health of the crew; in consequence of this

(a) 3 Bos. & Pull. 474.

necessity, therefore, the commodity was annihilated by being thrown overboard." We think the facts of the present case bring the hides into the same predicament, as the fruit there:—either they would have been annihilated by putrefaction or by being thrown overboard. And upon that supposition, a sale by the captain, which is found necessary and expedient for all concerned, made the loss not the less total.

If then the loss be a constructive total loss, the only remaining question is, Whether a notice of abandonment was necessary in order to enable the Plaintiff to recover. The necessity of abandoning to the insurer all the right of the assured to what may be saved or recovered from the peril insured against, arises out of the very nature of the contract of insurance, which is a contract of indemnity only: for the assured would obviously be more than indemnified, unless the underwriter is put into his place as to all the benefit that may be derived from what has been actually saved or recovered from the loss: hence it has prevailed as a general rule in the law of insurance, and that, from so early a time, that it is difficult to find a case in the books in which it is not taken as an admitted principle, that in order to recover for a constructive total loss, the assured must first abandon.

It is unnecessary, however, to refer to cases or authorities in support of this general principle, as it is admitted by the counsel for the Plaintiff, that abandonment is necessary in all cases of a constructive total loss, where any part of the thing insured subsists or remains in specie, and it is only denied that it extends to a case like the present, where what was saved has been actually sold, and the money paid over to the agent of the assured before any notice of the loss. In such a case, where the adventure is at an end, and nothing remains to be performed by the underwriter, with respect to

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the part saved, it is argued that an abandonment is altogether useless, and consequently must be considered in law as unnecessary; and it is contended that there is neither decided authority nor reason in support of a contrary position.

It will be convenient, therefore, to consider, first, What is the state of the authorities in the books on this precise point? and if the authorities shew that an abandonment is necessary, we will next consider whether there is any reason or principle for holding the present case not to fall within the general rule.

That the assured must abandon before he brings his action, where the ship has been captured and recaptured and sold under the order of a Vice-Admiralty Court, and where, after payment of the salvage to the recaptors, the remainder of the price has been paid into court for the benefit of those who may claim as owners, appears clearly from the earliest case to be found in our books upon the subject of abandonment, viz. that of *Pringle v. Hartley*. (a) In that case after the plaintiff had sued at law for a total loss, and after proving an offer to relinquish his interest to the insurers, had recovered a verdict, Lord *Hardwicke* on a bill filed for an injunction, held there was no ground for it; but that the plaintiff being willing to relinquish his interest in the salvage to the underwriter, ought to have recovered the whole money insured. Now it must be admitted that this decision does not go the length of governing the present case; for in the case referred to, as Lord *Hardwicke* observes, "it is uncertain whether the insured will receive any thing or not; and if any thing be recovered, he must have an allowance for his expenses in recovering it." And there are even expressions used by Lord *Hardwicke* in giving his judgment which would rather

(a) 3 Atk. Rep. 195.

lead to the inference, that if the money had been paid out of court to the owner before the action was brought, the jury might in his opinion have taken notice of it, and it might have been deducted out of the money recovered on the policy; so that the case of *Pringle v. Hartley* certainly cannot be advanced as an express authority that an abandonment was necessary here.

The case of *Mitchell and Others v. Edie* (a) carries the law further, and indeed almost to the length contended for in the present case. There, the goods were sold and the price paid into the hands of *Cruden*, who was adopted by the assured as their agent. It was held that the plaintiffs were not entitled to recover for a total loss, because they had not abandoned in time. Both Mr. Justice *Ashhurst* and Mr. Justice *Buller* use the most general terms, that in all cases where any part of the property is saved the assured must abandon. And they apply that rule to the case before them, where the goods had been sold for the benefit of all.

The case of *Allwood v. Henekell*, sittings after *Michaelmas* 1795, reported in *Park on Insurance*, 280., goes to the full extent of that in *Atkins*. The ship had been sold under the order of the Vice-Admiralty Court of *Antigua* by a prize agent, who received the proceeds and was to pay them over to those concerned, upon payment of one eighth salvage to the captors. The question was Whether the abandonment was made in time: and it was thereupon contended by the plaintiff, that admitting there was no abandonment, yet as the property had been absolutely sold and converted into money before the parties knew where the ship was taken to, the loss was absolutely total in its nature, and therefore there was no occasion for an abandonment. Lord *Kemyon*, though he did not give any decided opinion on

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the point, said he inclined to think "that an abandonment was necessary, and that the case was the same as if the property had remained in specie at *Antigua*, and had not been sold." And as the plaintiff recovered upon the footing of *an average loss* only, it would seem that Lord *Kenyon's* opinion was acquiesced in.

The next case in order of time is that of *Hodgson v. Blakiston*, 38 G. 3. (*Park on Insurance*, 281. n.) before the same noble and learned Judge, and this, like the last, though a *nisi prius* decision only, is a case directly in point, that a notice of abandonment is necessary though the ship and cargo has been sold, and converted into money, at the time when the notice of the loss is received. The opinion of Lord *Kenyon* in this case must have been assented to as law at the time, as no motion appears to have been made to set the verdict aside. And, indeed, the case itself is cited and relied upon as authority by the Court of Common Pleas in their judgment upon the case of *Read v. Bonham*.(a) That case again is a distinct and direct authority upon the present point. In that case, the ship had been sold, and the money paid to the captain, and after a verdict for the plaintiff for a total loss, a new trial was moved for on the ground that the sale of the ship was not necessary, and that the abandonment had not been made in time: the Court, however, refused to grant a new trial on either point, though Mr. Justice *Richardson* wished both to be reconsidered by the jury. But it is evident from the report, that it was assumed as an undoubted principle by the whole Court, that abandonment was necessary in that case; the dissent of Mr. Justice *Richardson* as to the *time* of the abandonment making the inference still more strong, that in the judgment of the whole Court an abandonment was necessary. And this statement of

(a) 3 Brod. & Bingh. 147.

the case of *Read v. Bonham* removes in some degree the weight of the judgment of Mr. Justice *Bayley* in the case of *Cambridge v. Anderton*, as reported in 1 *Carrington and Payne's Rep.* 215. in note, in which Mr. Justice *Bayley* is made to say, "I take the legal principle to be, that if by any perils within the policy, the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment." For Mr. Justice *Bayley* proceeds to cite the case of *Read v. Bonham*, as an authority in support of his opinion, which case, although certainly an authority for the position that a sale of the ship in case of urgent necessity is justifiable, and constitutes a total loss, is no authority for the position that abandonment is unnecessary in that event, but an authority the other way. The case is afterwards reported in banc, 2 *B. & Cres.* 697. Again, the case of *Parry v. Aberdeen (a)* is one that bears a strong resemblance to the present: the goods having been sold, as here, for the benefit of those concerned. But, in that case, there had been an abandonment, upon which Lord *Tenterden* relies strongly in various parts of his judgment. And as to the case of *Manning v. Nunham*, upon which considerable reliance was placed by the defendants, and in which it was supposed the plaintiffs had recovered without an abandonment, upon reference to the report of that case in 3 *Dougl.* 130., it appears an abandonment had been made.

The necessity of abandonment, therefore, in the present case, so far as it stands upon authority, rests on the generality of expression used in all the early cases, that wherever the assured claims for a total loss, there being any thing saved, he must first relinquish to the underwriter all his interest in what remains. And upon the express authority of the cases above referred to,—

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(a) 9 *B. & C.* 411.

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in opposition to which there is found no other decided case than that of *Cambridge v. Anderton*, so that the balance of authority is clearly in favour of the position that abandonment is necessary in the present case, — and upon principle, if the matter were *res integra*, we should come to the same conclusion. For as the assured in no case is bound to consider the loss a total loss, but may always take to what is saved, and recover for an average loss; if it is to be held that abandonment is unnecessary where there has been a sale, the underwriter can have no certainty as to his rights or his liabilities before the assured determines his election by bringing the action for a total loss. This uncertainty in itself, and if no other consequence follows, is highly prejudicial to the underwriter; it may be further prejudicial in its direct consequences; agents may fail in whose hands the proceeds are left; the rate of exchange may alter where delay in procuring the remittance of the price has taken place; and, still further, the right of the underwriter to dispute the validity of the sale with the purchaser of the ship or cargo, upon the ground of fraud, might, by the intervention of time, be impaired or entirely defeated.

As notice of abandonment, therefore, under the circumstances of this case, is an act of no difficulty to the assured; of great service to the underwriter; as it is well calculated to prevent fraud; as it is consistent with the general understanding which has prevailed in practice, and is sanctioned by the authority of decided cases, — we think it was a necessary preliminary to the Plaintiff's right to sue for a total loss in the present case; and, therefore, for want of such notice of abandonment, we give our judgment for the Defendant.

Judgment for Defendant.

J.R. 69. 352.

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BARNES v. JACKSON and Two Others.

Jan. 31.

QUARE IMPEDIT against three. The writ was returnable on the 8th of *January* 1834, and two of the Defendants appeared on the 11th of *January* 1834.

The sheriff having returned *nihil* as to *Jackson* the incumbent, an *alias quare impedit* was issued, returnable *April* 15th, 1834, on which *alias* writ he was summoned, and appeared.

The declaration, in *quare impedit*, not having been delivered till the 10th of *January* 1835,

A rule *nisi* was obtained, calling on the Plaintiff to shew cause why the declaration should not be set aside for irregularity, on the ground that the writ on which two of the Defendants had appeared, was returnable more than a year before the declaration was delivered. *R. Hil. 2 W. 4. No. 35., Worley v. Lee (a), Cooper v. Nias. (b)*

In *quare impedit* the writ was returnable *Jan. 8. 1834.* Defendants appeared *Jan. 11. 1834.* Plaintiff declared *Jan. 10. 1835.* The Court set aside the declaration as too late.

Coleridge Serjt. shewed cause. The rules of *Hil. 2 W. 4.* do not apply to real actions, among which *quare impedit* must be classed, but only to those kinds of action in which the Courts have concurrent jurisdiction; the express object of the rules being to render the practice uniform. But the practice of declaring within a year from the return of the writ, can only be applicable to personal actions; *Buller J.*, in propounding the rule, (*2 T. R. 112.*) does not advert to real actions; and it is altogether incompatible with the delay, which, in those actions, was allowed by way of *essoin*.

(a) 2 T. R. 112.

(b) 3 B. & Ald. 272.

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Then, the impossibility of serving the incumbent with the other Defendants, affords a reason for the delay, sufficient to induce the Court to give the Plaintiff time to declare till *April*; *Wynn v. Bellman*. (a)

At all events, the Plaintiff may abandon his writ as to two of the Defendants, and declare against the incumbent alone; *Christie v. Walker*. (b)

Wilde and Bompas Serjts., and *Bere*, in support of the rule. First, *quare impedit* is not a real, but a mixed action. *Eaton v. Southby* (c); *Com. Dig. Qu. Imp.*; *Vin. Abr. Presentation*. The Plaintiff seeks to recover only the next turn, which is a chattel interest that passes to executors; *Mirehouse v. Rennell*. (d)

But if this be deemed a real action, the rule in *Worley v. Lee* is laid down without qualification, and must be held to embrace real as well as personal actions. Originally, the practice in both was the same, and continued so except where it was altered by statute; *Booth's Stat at Law*; *Gilb. Hist. Com. Law*, 11, 12. 26. 33, 34. 38, 39. And a real action could not be indefinitely prolonged by *essoins*, for the demandant procured from the Court a *dies datus* to count. By the statute of *Marlebridge* it is provided, that "in a plea of dower, that is called *unde nihil habet*, from henceforth four days shall be given in the year at least, and more if conveniently it may be, so that they shall have five or six days at the least in the year. In assizes of *darrein presentment*, and in a plea of *quare impedit*, of churches vacant, days shall be given from fifteen to fifteen, or from three weeks to three weeks, as the place shall happen to be near or far. And in a plea of *quare impedit*, if the disturber come not at the first day that he is summoned, nor cast no *essoins*, then he shall be attached at another day; at

(a) 6 Taunt. 122.

(b) 1 Bingham. 48.

(c) Willes, 131.

(d) 8 Bingham. 490.

which day, if he come not, nor cast no *essoin*, he shall be distrained by the great distress above given; and if he come not then, by his default a writ shall go to the bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the Plaintiff; saving to the disturber of his right at another time, when he will sue therefore." And Lord Coke says, "in a *quare impedit*, or *darrein presentment*, an *essoine de service le roy*, *ad terram sanctam*, or *ultra mare* lyeth not for doubt of the laps." (a)

Then, as to the Plaintiff's not having been able to serve the incumbent, in an action against several Defendants, where some appear, and others are not served, the Plaintiff must take out a rule for time to declare, if he would avoid a *non pros.* for not declaring in due time. *Sykes v. Barwens* (b); *Morton v. Grey*. (c) In *Christie v. Walker*, the chief question was, as to the regularity of a declaration delivered *by the by*, before the delivery of a declaration in chief.

Cur. adv. vult.

TINDAL C.J. This rule calls upon the Plaintiff to shew cause why the declaration against the three Defendants should not be set aside for irregularity, on the ground that the writ of *quare impedit*, upon which two of the Defendants had been duly summoned and had appeared, had been returnable for more than a year before the declaration was delivered. The writ of *quare impedit*, upon which the two Defendants were summoned, was returnable on the 8th of January 1834; the Defendants appeared thereon on the 11th of January 1834; and the sheriff having returned *nihil* as to the third Defendant, Jackson the incumbent, an *alias quare impedit* was issued, returnable on the 15th of April,

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(a) 2 Inst. c. 12. p. 125.

(c) 9 B. & C. 544.

(b) 2 N. R. 404.

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on which alias writ he was summoned and appeared. The declaration in *quare impedit* was not delivered until the 10th of *January* 1835.

One ground upon which the motion was urged, was the new rule of Court of *Hilary* term, 2 *W.* 4. No. 35. But we think those rules do not extend to real actions, but to such proceedings only in which the three Courts of *Westminster* exercise a concurrent jurisdiction. However, the ground principally relied on, is the general rule of law, by which a Plaintiff must declare within twelve months after the return of the writ. This is laid down by *Buller J.* in 2 *T. R.* 112. as an acknowledged rule of practice: not that the Defendant can sign any judgment of *non pros.* for not declaring, for no such judgment can be signed until after a demand of declaration; but that after the lapse of a twelvemonth from the return of the writ the delivery of the declaration comes too late. The same rule is admitted in 3 *T. R.* 123., and in 9 *B. & C.* 544. In *Cooper v. Nias (a)*, the question arises, whether the twelvemonth is to be calculated from the return day of the writ, or the time of the appearance: the Court say,—“The rule is, if the plaintiff does not declare within a year after the return day of the writ, he is out of Court. The safest course is to reckon the twelve months from the return day: the time given to put in and perfect bail is merely matter of indulgence.” No case appears by which this rule has been shewn to be applied to real actions; but, at the same time, no distinction is made in the books between them; and the rule, in principle, applies equally to actions of all kinds: the object being, that suits should not be kept alive an unreasonable time after the parties are in Court; and if the demandant is not bound to declare within one year, there seems no reason why he should not be at liberty

(a) 3 *Barn. & Ald.* 272.

to do so for an indefinite period. The plaintiff or demandant is not injured by this rule; for if he has any reason for not declaring, as on account of all the parties not being brought into Court, it is the very constant course to apply for time to declare against those who have appeared.

We, therefore, think the Plaintiff is out of Court as to the two Defendants who appeared under the original writ, and that the declaration is irregular as to them, and must be set aside; but as to the Defendant *Jackson*, who appeared upon a writ returnable in *April*, the Plaintiff is in time to declare, and, as against him, the proceedings may go on.

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BOWER v. HILL and Another.

Jan. 31.

THE Plaintiff declared, that before and at the time of the committing of the grievances by the Defendants as hereinafter mentioned, the Plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain close of land, with the appurtenances, situated in the county of *Warwick*; and by reason thereof, during all the time aforesaid, ought to have had, and still of right ought to have, a certain way from the said close of the Plaintiff, unto and along a certain stream or watercourse in the county aforesaid, unto and into a certain public navigable river, called the river *Nene*, in the county aforesaid, and so back again from Defendants having erected, on their own premises, a permanent obstruction to a navigable drain leading from a river through Defendants' premises to Plaintiff's close, Held, that an action lay for the Plaintiff, notwithstanding the portion of the drain which passed through the Plaintiff's close had for sixteen years been completely choked up with mud.

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3. Exch. 764.
6. Exch. 364.
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the same river unto and along the said stream or watercourse, and from thence unto the said last-mentioned close of the Plaintiff, for himself and his servants to go, return, pass, and repass in boats every year, and at all times of the year, at his and their free will and pleasure: yet the Defendants, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the Plaintiff in that respect, and to deprive him of the use and benefit of his said way, whilst the Plaintiff was so possessed of his close, with the appurtenances aforesaid, and so entitled to the said way, to wit, on the 1st of *January* 1830, and on divers other days and times between that day and the day of the commencement of this suit, in the county aforesaid, wrongfully and injuriously obstructed the said way. By means whereof, the Plaintiff could not, during the time aforesaid, nor can he have or enjoy his said way as he of right ought to have done; and whereby also the Plaintiff hath been, and still is, hindered from having, enjoying, and occupying his said close in so full and beneficial a manner as he otherwise would, and of right ought to have done; to wit, at, &c.

At the trial before *Taunton J.*, last *Northampton* assizes, it appeared that a drain or watercourse passed from the river *Nene*, through the Defendants' closes up to a close of the Plaintiff: that the drain was navigable from the river up to the Defendants' closes, and had formerly been navigable up to the Plaintiff's close; but for the last sixteen years, the accumulation of mud in the drain between the Plaintiff's close and the Defendant's had been so great, that no barge could pass along that part of it. Under these circumstances, the Defendants had recently erected, on their own land, a bridge over the drain, and a tunnel across it, under the bridge, just below the accumulation of mud, in such a manner as to render any passage up to the mud impracticable.

In answer to a question proposed by the learned Judge, the jury found,—“ That before the erection of the bridge and tunnel by the Defendants, the passage was obstructed, so that the Plaintiff could not have the use of it:” and upon this finding, a verdict was directed to be taken for the Defendants.

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Adams Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set aside this verdict and enter, instead, a verdict for the Plaintiff, or to have a new trial, on the ground that, upon the evidence in the cause, the Plaintiff was entitled at least to nominal damages; his right to the watercourse and the value of his property being affected by the impossibility of retrieving the navigation to his premises if a permanent obstruction were allowed to exist. In order to sustain an action for the assertion of a right, it is not necessary that the party should have incurred pecuniary damage; *Marzetti v. Williams*. (a)

Hill and *Miller*, who shewed cause, contended, that as the Plaintiff, in consequence of the accumulation of mud upon his own premises and between them and the Defendants', was never in a position to be obstructed by any act of the Defendants' on the drain, he could not recover even nominal damages for that which was no injury, or if an injury, was occasioned in a great measure by his own neglect: *Com. Dig. Action on the Case*, B. 4: for a party who brings case must have justice on his side: *Bird v. Randall*. (b) In like manner, a commoner cannot maintain an action where the lord of the manor is Defendant, unless a specific injury has been sustained: 1 *Wms. Saund.* b. note. 346. The Plaintiff, here, unless he has incurred some damage, cannot sue the

(a) 1 B. & Adol. 415.

(b) 3 Burr. 1345.

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Defendants for an act done on their own soil; that act not being necessarily injurious to the Plaintiff's reversion; *Baxter v. Taylor*. (a) In *Williams v. Morland* (b), a Plaintiff alleged in his declaration that he was possessed of a messuage and premises, and by reason thereof entitled to the use of a stream of water running through the premises, for supplying the same with water; that Defendant erected a dam higher up the stream, and thereby prevented the water from running in its course, in its usual calm and smooth manner, whereby the water ran in a different channel, and with greater violence, and injured the banks and premises of the Plaintiff: on issue joined on a plea of not guilty, the jury found that the Plaintiff's banks and premises were not injured by the dam erected by the Defendant, but added, that Defendant had no right to stop the water in the summer-time: the Judge ordered the verdict to be entered for the Defendant; and it was held, that the verdict was right; for flowing water was *publici juris*, and an individual could only acquire a right to it by appropriating so much of it as he required for a beneficial purpose; and therefore the Plaintiff could not recover damages for the mere erection of a dam, but was bound to allege and prove that he had sustained an injury from the want of a sufficient quantity of water.

Adams and Humfrey, in support of the rule. In *Williams v. Morland* nothing was done by the Defendant that could affect the Plaintiff's title: In the present case, if the Plaintiff were to acquiesce in the obstruction erected between his own premises and the river, his title to navigate the watercourse could in a few years be lost. His right to a common benefit from the chan-

(a) 4 B. & Adol. 72.

(b) 2 B. & C. 910.

nel cannot be disputed : *Mason v. Hill.* (a) But a permanent obstruction tends to impair his title, and therefore is an injury for which he is entitled to damages.

Cur. adv. vult.

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TINDAL C. J. This question comes before us on a motion for a rule to set aside a verdict entered for the Defendants by the direction of the learned Judge; and the motion is made, on the ground that the finding of the jury, on certain points left to them, does not warrant such verdict; and, at all events, that, upon the evidence given in the cause, the verdict ought, properly, to have been found for the Plaintiff.

The Plaintiff declared in case; stating in his declaration, that he was possessed of a close, and entitled to a right of way from the said close along a certain drain or watercourse, unto and into a public navigable river called the *Nene*, and so back again, for himself and his servants to go, return, pass, and repass in boats, at his free will and pleasure; and the Plaintiff then assigns as a grievance, that the Defendants, knowing the premises, wrongfully and injuriously obstructed the said way, by means whereof the Plaintiff could not enjoy it as he of right ought to do. At the trial, the jury, in answer to a question proposed to them by the learned Judge, found, “ that the passage was obstructed before the erection of the bridge and tunnel by the Defendants ” (which was the act complained of), “ so that the Plaintiff could not have the use of it; ” and upon this finding of the jury, the learned Judge directed the verdict to be found for the Defendants.

It appeared, upon the evidence, that the Plaintiff’s close and premises were at the further end of the drain or watercourse; and that the Defendants’ premises,

(a) 5 B. & Adol. 16. 24.

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upon which the obstruction was erected, were situated between the Plaintiff's premises and the river *Nene*: and it further appeared, that the accumulation of mud in the drain between the Plaintiff's close and the Defendant's premises had been so great, and was so great at the time of the erection of the bridge and tunnel by the Defendant, that for the last sixteen years, no barge could navigate or pass along that part of the drain or watercourse; and that the Defendant had erected the bridge and tunnel across the drain at his own premises, just below the accumulation of mud, in such manner as to render any passage through the bridge and tunnel, even if the mud had been removed, altogether impracticable. And the question raised before us has been, whether, in this state of circumstances, there was such an obstruction of the right of passage along the watercourse, as can form the ground of an action against the Defendants. But we think the right to the verdict, in this case, may be decided upon a narrower ground. The right of navigating through the drain or watercourse, from the Plaintiff's close to the *Nene* and back again, is equally a right to navigate through the drain from the river *Nene* to the Plaintiff's close and back. And upon the evidence in this case, if the Plaintiff should endeavour to pass with a boat or barge from the river *Nene* to his premises, he would be prevented, by the Defendants' erection, from even arriving so far up the drain as to reach the impediment created by the mud. The Plaintiff, therefore, would, in the strictest construction of the words in the declaration, "be prevented, by the Defendants' obstruction, from enjoying his way, as he of right ought to do;" for he could not get so near his premises, as, but for the erection of the tunnel, he might have done. And although this would, in fact, be but a very small prevention of the exercise of his right, yet it is the

principle on which we are to decide, and not the particular state of facts which apply to the present case; for if the obstruction had been at the very mouth of a drain, and the accumulation of mud had commenced several miles up, and close to the Plaintiff's close, the same argument would have applied; in which case, it is obvious that the damage to the Plaintiff, by such an intervening obstruction, might have been very great. Upon this ground, therefore, we think the case must go down to another jury, unless it is consented that he should take a verdict with nominal damages only.

But, independently of this narrower ground of decision, we think the erection of the tunnel is in the nature of, and, until removed, is to be considered as, a permanent obstruction to the Plaintiff's right, and therefore an injury to the Plaintiff, even though he receive no immediate damage thereby. The right of the Plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises: *Jesser v. Gifford* (a). (The Plaintiff's premises would sell for less whilst the tunnel is in existence, if now put up to sale.) And, indeed, there seems no legal ground upon which the facts relied on by the Defendants can constitute an answer to the charge upon the record. As a plea of denial of the charge, they would not support it; for the tunnel was erected by the Defendants, and the erection is such as effectually to prevent barges from passing through it, whether they can come up to it or not. Again, if put upon the record as a plea in bar,

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(a) 4 Burr. 2141.

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they would amount to a confession of the charge without being an avoidance; for it is no excuse to the Defendants, that the Plaintiff has voluntarily suffered an accretion of the mud, which he might remove at any time when he thought fit. The voluntary suspension by the Plaintiff of his exercise and enjoyment of a right, can form no justification to the Defendants for preventing him from the possibility of enjoying it.

Upon the more general ground, therefore, that the erection of the bridge and tunnel is an immediate injury to the Plaintiff, by putting his right into hazard, and by preventing the actual enjoyment of it whenever he thinks fit to resume it, independently of the narrower ground on which we first relied, we think this action maintainable; and that the rule for a new trial must be made absolute.

Rule absolute.

Jan. 31.

WELLS v. PEARCY.

By a local act all rights of common whatever in *B.* were extinguished; the wastes were divided; the owners of allotments were directed to inclose,

and authorised to distrain the cattle of strangers trespassing. No fence having been made, Held, that the owner of an allotment in *B.* could not distrain cattle which had strayed into his allotment from a common in *W.*, in pursuance of an alleged right of common *pur cause de voisinage* in the inhabitants of *W.*

19. 2^d M. 145.

three acres of land with the appurtenances, situated and being in the parish aforesaid; that he, and all those who before him had successively occupied the said cottage and land with the appurtenances, for and during the full period of thirty years next before the time of affixing such notice in writing as thereafter mentioned, as such occupiers, without interruption, and claiming right thereto, had used and actually enjoyed, and had been accustomed to have, use, and enjoy, and of right ought to have had, used, and enjoyed, and the Defendant, as such occupier of the said cottage and land with the appurtenances as aforesaid, at the time of affixing the said notice in writing as thereafter mentioned, ought to have had, used, and enjoyed, for himself and themselves respectively, so occupying as aforesaid, common of pasture in, upon, and throughout the said close in which, &c., for all his and their commonable cattle, levant and couchant, in and upon the said cottage and land with the appurtenances, every year, at all times of the year, as to the said cottage and land with the appurtenances belonging and appertaining. That the Defendant, so being such occupier of the said cottage and land with the appurtenances, and so entitled to such right of common as aforesaid, by a certain act of parliament made before the said time when, &c., that is to say, at the parliament of our lord the now King, at a session thereof holden at *Westminster* in the third year of his reign, intituled "An Act for enclosing Lands in the Parish of *Bpton* in the County of *Sussex*," it was, amongst other things, enacted, that it should be lawful for a certain commissioner in the said act named, and he was thereby authorised, at any time or times before the execution of his award as in the said act mentioned, by notice in writing under his hand to be affixed on the principal outer door of the parish church of *Bpton*, on some *Sunday* previous to divine service, to order and

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direct all or any part of the rights of common in, over, or upon the said common called *Bepton Common*, and the wastes and waste lands contiguous or belonging thereto, or any part thereof, to be extinguished, or the exercise thereof to be suspended, for and during such time as should be expressed in such writing; and that all such rights of common as the said commissioner should by such writing order and direct to be extinguished, or the exercise thereof to be suspended as aforesaid, should, from the time of affixing such writing on the said church door, cease, determine, and be extinguished, or the exercise thereof be suspended accordingly, any law, usage, or custom to the contrary notwithstanding: that if, during such suspension, or after such extinguishment of such rights of common, or other rights as aforesaid, any of the said proprietors, or occupiers, or claimants of pasturage and common rights there, or any other person or persons whosoever, should permit his, her, or their cattle or sheep to go, depasture, or feed on any of the said lands or grounds over which such right of common or other rights should be extinguished or suspended, then it should be lawful for any other of the said proprietors or occupiers to distrain such cattle or sheep being upon such lands or grounds contrary to such notice, and to impound the same until such person or persons so offending should pay to the person or persons so distraining any sum not less than 6s., nor exceeding 10s., for each head of cattle, and not less than 2s., nor exceeding 5s., for each sheep so distrained, as any one justice of the peace for the said county of *Sussex* should direct; and that in case the same, with all the costs, charges, and expences, should not be paid within five days after such impounding, the said justice was thereby authorised and empowered, upon proof of such offence or offences having been committed, and nonpayment of the penalty or penalties incurred, to cause the cattle or

sheep so distrained, or such of them as he should think fit, to be sold for raising and paying the penalty or penalties incurred as aforesaid, together with the costs and charges attending every such distress and sale; rendering the overplus, if any, upon demand, to the owner or owners of such cattle or sheep.

That the said act of parliament having been so made as aforesaid, the said commissioner did, after the making of the said act of parliament, and by virtue and in pursuance thereof, and before the said time when, &c., and before the execution of his award in the said act mentioned, by notice in writing under his hand, bearing date a certain day and year therein mentioned, to wit, the 19th of *July* 1883, — and which notice was duly affixed on the principal outer door of the said parish church of *Bepton* aforesaid, on *Sunday* the 21st of *July*, in the year last aforesaid, previous to divine service, — order and direct that all the rights of common in, over, or upon the said common called *Bepton Common*, and waste lands contiguous or belonging thereto, should be, from the time of affixing the said writing on the principal outer door of the said parish church of *Bepton*, for ever thereafter extinguished. That the said writing having been so made and affixed as aforesaid, all rights of common in, over, and upon the said common called *Bepton Common*, and the wastes and waste lands contiguous and belonging thereto, thereby became and were wholly extinguished by virtue of the said act of parliament. That the close in which, &c., called the common, otherwise *Bepton Common*, and the said common in the said act of parliament mentioned, were and are one and the same common, and not other and different. And because the Plaintiff afterwards, and after the said rights of common had been and were so extinguished as aforesaid, to wit, at the said time when, &c., permitted his said cattle in the declaration men-

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tioned to go, depasture, and feed, and because the same, at the said time when, &c., were on the said close in which, &c., depasturing and feeding there, and over which said close the rights of common had been so extinguished as aforesaid, the Defendant, as such occupier as aforesaid, well avowed the taking of the said cattle in the said declaration mentioned in and upon the said close in which, &c., as just, &c., as for and in the name of a distress, by virtue and in pursuance of the said act of parliament; and that, the Defendant was ready to verify, wherefore he prayed judgment, and a return of the said cattle, &c.

The Plaintiff pleaded, that the said close, in which, &c., before and at the said time when, &c., and from time whereof the memory of man is not to the contrary, was, and still is, contiguous and next adjoining to a certain common or waste consisting of divers, to wit, twenty acres of waste, situate, lying, and being in the parish of *Woolbeding*, in the county aforesaid, called *Woolbeding Common*, and had never been separated or divided from the said last-mentioned common called *Woolbeding Common* by any inclosure, hedge, or fence whatever, sufficient to prevent cattle from time to time feeding and depasturing in the said common or waste called *Woolbeding Common* from erring or escaping therefrom into the said close in which, &c.; that the said cattle, from time to time, during all that time, duly put on the common called *Woolbeding Common*, to use the common of pasture in, upon, and throughout the said common called *Woolbeding Common*, from time immemorial had gone, escaped, and rambled, and had been used and accustomed to go, escape, and ramble therefrom into the said close in which, &c., and to intermix there and feed with cattle from time to time feeding on the grass growing in and using the common of pasture in, over, and throughout the said last-men-

tioned close ; and in like manner, the cattle from time to time, during all that time, duly put in the said close in which, &c., to use the said common of pasture in, upon, and throughout the said close in which, &c., from time immemorial had gone, escaped, and rambed, and had been used and accustomed to go, escape, and ramble therefrom, into the said common called *Woolbeding Common*, and to intermix there and feed with cattle from time to time feeding on the grass growing on the said last-mentioned common. That by the said act of parliament in the said avowry of the Defendant mentioned, it was, amongst other things, enacted, that the several and respective allotments to be made in the said common called *Bepton Common* and waste lands in the said act and avowry mentioned, after the division thereof, should, within twelve calendar months, to be computed from the signing and sealing the award of the said commissioner in the said act and avowry mentioned, or within a shorter space of time, to be computed by the said commissioner either before or after the execution of his award, be enclosed, fenced, and divided, either by hedges, ditches, or otherwise, as the said commissioner should direct ; all which said inclosures and fences should be so made, planted, and guarded by and at the proper costs and charges of the respective persons to whom the said allotments should be respectively made, in such manner, share, and proportion as the said commissioner should in and by his award direct. That the said close in which, &c. had not yet been, nor was it at the said time when, &c. enclosed, fenced, separated, or divided from the said common called *Woolbeding Common* by any hedge, ditch, or otherwise, sufficient to prevent cattle feeding and depasturing in the said common called *Woolbeding Common* from erring or escaping therefrom into the said close in which, &c. That the Plaintiff was not, nor were the persons having

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therefrom by any inclosure, hedge, or fence sufficient to prevent cattle feeding and depasturing in the said common called *Woolbeding Common* from erring or escaping therefrom into the said close in which, &c., the said cattle of the Plaintiff in the declaration mentioned, just before the said time when, &c., to wit, on, &c., of their own accord, and without the knowledge or consent of the Plaintiff, went, escaped, and ramblod out of the said common or waste called *Woolbeding Common* into the said close in which, &c., and remained and continued therein, on the occasion aforesaid, without the knowledge of the Plaintiff, until the Defendant, before the Plaintiff had or could have any notice that the said cattle were in the said close in which, &c., to wit, at the said time when, &c., of his own wrong, took the said cattle in the said close in which, &c., and unjustly detained the same against sureties and pledges, in manner and form as the Plaintiff had above thereof complained against the Defendant; and further, that no justice of the peace of the county of *Sussex* had, at any time since the time when, &c. directed or ordered the Plaintiff to pay any sum of money or penalty for the said cattle so taken and distrained by the Defendant as aforesaid, being on the said close in which, &c., at the said time when, &c., and that, the Plaintiff was ready to verify, &c.

Demurrer and joinder.

Platt, in support of the demurrer, contended that all rights of common in *Bepton* being extinguished by the *Bepton Inclosure Act* set out in the avowry, the Plaintiff's common *pur cause de vicinage* shared the like fate;—there was no longer any mutuality between the inhabitants of the two parishes;—while the existence of that act, and the trespass committed by the Plaintiff's cattle, not being denied by the plea, judgment must pass for the

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avowant. The rights of common were not extinguished upon condition of the *Bepton* parishioners making a fence, but absolutely. As to the avowant's omission to go before a magistrate, it might furnish ground for a cross action, but was no justification of the Plaintiff's trespass,

W. H. Watson, for the Plaintiff. The *Bepton* Enclosure Act may extinguish all rights of common in *Bepton*, but can have no effect on the rights or immunities of other parishes.

Now, common *pur cause de vicinage* is an excuse for a trespass: *Com. Dig. Common*, E.; *Vin. Abr. Common*, K.; *Bac. Abr. Common*, A. 4.; analogous to the excuse arising from defect of fences which a neighbour is bound to repair: 2 *Wms. Saund.* 285. n. 4. Here the parishioners of *Bepton* were bound, under their own inclosure act, to fence the common lands enclosed; and as they have failed to do so, the excuse for trespasses by cattle of the parishioners of *Woolbeding* remains the same as before. The enactment that the *Bepton* proprietors and occupiers may distrain, if *any person whatsoever* shall permit his cattle to feed on *Bepton Common*, can be applied only to any persons whatsoever in *Bepton*; for other parishes have no notice of the act.

At all events, the avowant could only, pursuant to this act, keep the cattle till a magistrate had decided what damages the owner should pay; the avowant, therefore, not having averred that he went before a magistrate, must be considered a trespasser *ab initio*: 2 *Roll. Abr.* 563. *Com. Dig. Tresp.* C. 2.

Platt, in reply, contended, that the act, though local, was binding on all persons; and that, therefore, the avowant was justified, under the general power, to distrain the cattle of any person whatsoever feeding on the common after the notice given at the church door.

Cur. adv. vult.

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TINDAL C. J. The question in this case arises upon the pleadings on the record, in which, after a declaration in *replevin* for taking the Plaintiff's cattle upon *Bepton Common*, the Defendant avows for *damage feasant*, stating in his avowry, that he the Defendant, before and at the time of passing the enclosure act, part of which is afterwards set forth, was entitled, as occupier of a certain cottage and land in *Bepton*, to a prescriptive right of common of pasture over the *locus in quo*. The avowry then proceeds to set forth some of the provisions of the statute 3 W. 4. for enclosing lands in the parish of *Bepton*, from which it appears that the commissioner appointed by the act had authority, before the execution of his award, by notice in writing under his hand, to direct "that all the rights of common in, over, or upon said common called *Bepton Common*, should become extinguished," and that if, after such notice, any of the claimants of pasturage or common rights, or any other person or persons whatsoever, should permit their cattle or sheep to feed or depasture on any of the lands on which such rights of common were so extinguished, it should be lawful for any other proprietor or occupier to distrain them in manner pointed out in the act. The avowry then proceeds to state, that the commissioner did, on a certain day, give notice under the act, that all the rights of common in, over, or upon the said common called *Bepton Common*, should be, for ever thereafter, extinguished, whereby the same were extinguished accordingly. And that because the Plaintiff, after such rights of common were extinguished, permitted his cattle to feed and depasture on *Bepton Common*, he, Defendant, as occupier of the said cottage and land, distrained them under the power so given by the statute. To this avowry the Plaintiff pleads in bar, that the said place in which, &c. hath always been contiguous, and next adjoining to a certain other com-

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mon called *Woolbeding Common*, and hath never been separated therefrom by any fence sufficient to prevent cattle feeding on *Woolbeding Common* from erring and escaping into the close in which, &c. And the plea then prescribes for a right of common *pur cause de vicinage* from one common to the other. The plea in bar then proceeds further to set out a clause in the enclosure act, by which the several allotments made under the act are directed to be fenced and divided, by sufficient hedges or otherwise, within the time mentioned in the act; that the close in which, &c. hath not yet been fenced and divided from *Woolbeding Common*; and that neither he, the Plaintiff, nor the persons having right of common on *Woolbeding Common*, were, by the said commissioner or otherwise, directed to set up any enclosure or fence between the close in which, &c. and *Woolbeding Common*. And it lastly states that his cattle, being lawfully put upon *Woolbeding Common*, erred and escaped, of their own accord and without his consent, from *Woolbeding Common* into the place in which, &c.

To this plea there is a general demurrer; and the question raised upon the demurrer and argued before us, is, whether the Plaintiff is a trespasser by reason of his cattle, which were rightfully upon *Woolbeding Common*, erring and straying thence into the *locus in quo*, that is, into *Bepton Common*, after the extinguishment of the rights of common thereon under and by virtue of the enclosure act set forth in the avowry.

The nature of common *pur cause de vicinage* is clearly laid down and explained in 4 Rep. 38. b.; and by that book it appears to be, not any right of feeding on the adjoining common, but only "an excuse of trespass by reason of the ancient usage, which the law allows to avoid suits which would arise if actions should be brought for every such trespass when no separation or

enclosure is between the commons:" and, therefore, it is added, "one may enclose against the other; for *cessante causâ cessat effectus*." The same law is laid down by *Powell J.* in *Broomfield v. Kirber* (a):—"this sort of common must be in nature of an escape, and so an excuse. For a man cannot put in his cattle in common of vicinage originally, but they must escape. They may enclose, one against the other, if they will be at the charge." See, also, *Co. Litt.* 122. a. And it appears by a very modern case in 13 *East*, 348., that in order to put an end to the common *pur cause de vicinage* by enclosing, such enclosure must be complete, and that if it is not so, the cattle may still stray from the one common to the other without impediment, and the common *pur cause de vicinage* is not extinguished.

Now, it is manifest from the pleadings in this cause, that there was not any complete separation by enclosure between the common of *Bepton* and the common of *Woolbeding*, but that the *locus in quo* being part of *Bepton Common* was still left open to *Woolbeding Common* as much as it was before the enclosure act. With respect, therefore, to enclosure, the only mode of terminating a common *pur cause de vicinage* which is mentioned in the books, it is clear that no such termination exists in the present case.

But it is contended on the part of the avowant, that by the operation of the enclosure act, this right of common *pur cause de vicinage* was extinguished. And this is contended in argument upon two distinct grounds. First, it is argued, that all rights of common upon *Bepton* having been extinguished by the act, all reciprocity between the commoners on the adjoining commons is gone; and that, as there can be no longer any

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(a) 11 *Mod.* 72.

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straying from *Bepton Common* to *Woolbeding*, so the *Woolbeding* commoners can no longer excuse their cattle for straying upon the place which was, before the enclosure act, the *Bepton Common*. But, without deciding whether such would be the legal consequence or not, if due notice had been given to the Plaintiff that all rights of common upon *Bepton Common* had been extinguished by the act of parliament, we think it clear, in order that such extinguishment of the rights in *Bepton Common* may put an end to the excuse for straying from the adjoining common, and make the commoners of such adjoining common trespassers if their cattle stray therefrom, that there must be notice of this extinguishment. The question therefore is, has there been any such notice? Now, it is admitted by the pleadings that there has been no *enclosure*, the most effectual mode of giving notice that the licence to intercommon, or the excuse of mutual trespasses, has been put an end to. And as to any notice of what has been done in an adjoining township under a private act of parliament relating to that township, the act of parliament itself is no notice to them. And, lastly, there is no allegation upon the record of any notice, in fact, that the commoners of *Woolbeding* were not to permit their cattle any longer to stray from their own common; so that, upon the whole, we think there has been no sufficient notice in this case to make the *Woolbeding* commoners trespassers for continuing the use of a practice which has been carried on from the earliest time under an implied agreement; which agreement, in the absence of such notice, they might well suppose to continue in full force.

But, in the next place it is argued, that by the direct operation of the statute, the right of common *pur cause de vicinage* is taken away; for, that the commissioner directed by his notice, that *all the rights* of common in,

over, or upon, the place in question should be for ever thereafter extinguished. The answer, however, to this argument appears two-fold : first, the common *pur cause de vicinage* is not strictly and properly a right of common at all ; it is merely an excuse for a trespass : but, secondly, and principally, the act is only a private act of parliament, and is no more than an agreement between the *Bpton* commoners to extinguish their own rights of common, sanctioned and enforced by the legislature. The act, therefore, has no binding power on the rights of those who are strangers to it, and no parties to the agreement which it professes to confirm. So far, therefore, as depends on the operation of the statute, the rights of the *Woolbeding* commoners remain as they were before.

Upon the whole, therefore, we think on the facts stated in the pleadings in this cause, the right of the Plaintiff to his common *pur cause de vicinage* had not been taken from him at the time in question, and therefore that there must be

Judgment for the Plaintiff.

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MEMORANDA.

THE Right Honourable Sir *Wm. Elias Taunton*, Knt., one of the Judges of the Court of King's Bench, died the day before the commencement of this term; he was succeeded by Mr. Serjeant *Coleridge*, who, on the 28th of *January*, was sworn into office, and took his seat on the Bench on the following day.

The Right Honourable Lord *Lyndhurst*, having received the appointment of Lord High Chancellor, in the room of the Right Honourable Lord *Brougham* and *Vaux*, Sir *James Scarlett*, Knt., one of his Majesty's Counsel, was appointed to succeed his Lordship in the office of Chief Baron of the Court of Exchequer. Sir *James*, having been created a peer by the style and title of Baron *Abinger*, of *Abinger*, in the county of *Surrey*, and of the city of *Norwich*, on the first day of this term, took his seat on the Bench as Lord Chief Baron.

Sir *E. B. Sugden*, one of his Majesty's Counsel learned in the law, was in the course of the term appointed Lord Chancellor of *Ireland*, in the room of the Right Honourable Lord *Plunket*.

Frederick Pollock, Esquire, one of his Majesty's Counsel, and *William Webb Follett*, Esquire, received the honour of knighthood, and were appointed respectively to the office of Attorney and Solicitor-General, in the room of Sir *J. Campbell*, and *J. M. Rolfe*, Esquire. Sir *W. W. Follett* was also appointed one of his Majesty's Counsel.

On the first day of this term the following gentlemen, having respectively been appointed his Majesty's Counsel, were called within the bar, and took their seats accordingly; viz. —

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Fitzroy Kelly, Christopher Temple, Walker Skirrow, Richard Torin Kindersley, Edward Jacob, John Miller, Henry John Shepherd, Daniel Wakefeld, and James Wigram, of Lincoln's Inn, Esquires; William Burge, Thomas Joshua Platt, and George Spence, of the Inner Temple, Esquires; and Charles Henry Barber, of Grays Inn, Esquire.

END OF HILARY TERM.

NEW CASES

IN THE

COURT OF COMMON PLEAS,

1835.

AND

OTHER COURTS.

Easter Term,

IN THE

FIFTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges who sat in Banc during this term were,

TINDAL C. J.	GASELEE J.
PARK J.	BOSANQUET J.

WHITE v. PARKER.

April 24.

IN covenant by the assignee of a lessee for years against the assignee of the reversion, on a covenant to take trees and fixtures at a valuation at the end of the term, the Defendant pleaded that the next and immediate heirs of the testator devised of land to trustees, in trust to permit the testator's wife and daughters to receive the clear rents of three parts to their sole and separate use, and the testator's son the clear rent of the fourth part; the trustees to pay all outgoings, to repair, and to let the premises: Held, that the legal estate, as to all the four parts, vested in the trustees.

Upon the death of one of two trustees, the survivor was to appoint another in place of the deceased, and to convey the premises to him, to hold them jointly with the survivor. One of the trustees being dead, the survivor, by a deed to which the *cestuique trusts* were parties, appointed P. sole trustee, in place of himself and the deceased, and conveyed the premises to P., to hold to him and his heirs, and not jointly with the surviving trustee. Held, that the whole legal estate passed by that conveyance to P.

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diate reversion in the demised premises did not vest in the Defendant.

At the trial before *Tindal C. J.*, the Plaintiff, after proving a lease of the premises to the person who assigned to himself, by *George Adams* the elder, for twenty-five years from *October 1807*, put in the will of the said *George Adams*, who died in 1809.

By that will, *Adams* devised all his land in the parish of *Acton* (including all the demised premises), and all other his real estate whatsoever, and all his estate and interest therein, with their appurtenances, to *Joseph Ringham* and *Thomas Suter*, their heirs and assigns, upon trust, as to one-fourth part of all his said devised real estate, to pay or to permit and suffer his wife *Catherine Adams* to have and receive the clear yearly rents and profits thereof, for and during the term of her natural life; with remainders over to his son *George Adams*, and his daughters *Elizabeth*, the wife of *William Wright*, and *Mary Adams*, and to the survivors of them, in fee. And as to one other fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his son *George* to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of his natural life; and from and after his decease, in trust as to the same fourth part, for the eldest or only son (as the case might be), of his son *George*, who should be living at his decease, his heirs and assigns: and if his son *George* should not leave a son surviving him, then in trust for such person or persons as at the decease of his son *George* should be his heir or heirs, and his, her, or their heirs and assigns. And as to one other fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his daughter *Elizabeth Wright*, wife of the said *William Wright*, to have and receive the clear yearly rents and profits thereof, for and during the term

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of her natural life, with remainders over to her issue, or heirs. And as to the remaining fourth part of and in all his said devised real estates, upon trust to pay to or permit and suffer his said daughter *Mary* to have and receive the clear yearly rents, issues, and profits thereof, for and during the term of her natural life, with remainder over to her issue or heirs: the several parts and shares of his said wife and daughters in the rents and profits of the said devised real estates to be for their respective sole and separate uses whilst under coverture, and to be paid into their own hands or to such person or persons as they respectively should from time to time, by writing under their hands, order direct, or appoint, and not to be subject to the control of any husband. He directed his trustees and the survivor of them, and the heirs and assigns of such survivor, from time to time, in their own judgment and discretion, to let and set his said devised real estates for such term or terms of years not exceeding seven years, and on such conditions as they should think fit, always reserving the best and most approved yearly rent or rents which under all circumstances could be reasonably had or gotten for the same. And further, during the continuance of the trust thereinbefore declared of and concerning his said devised real estates, out of the rents, issues, and profits thereof, to pay and discharge all outgoings, for taxes or otherwise, in respect to the premises, and to keep the premises in repair, and to retain payment for their expenses. And he directed that, upon the decease of his said trustees, or either of them, or of any other trustee to be appointed by virtue of that authority, or upon his or their refusing or becoming incapable to act in the trust, a new trustee or trustees should be appointed in his or their place and stead, by the surviving or continuing trustee, or the executors or administrators of the surviving trustee; and thereupon the trust

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estate and premises should be conveyed to and vested in the surviving or continuing and the new appointed trustee or trustees jointly: and in case there should be no surviving or continuing trustee or trustees, then in such newly appointed trustee or trustees and their heirs, upon the several trusts thereinbefore declared, of and concerning the same, or such of them as should be then subsisting or capable of taking effect; and that every such new trustee should and might act therein as if he had been appointed by the testator.

Ringham died in 1818; and, in *November* in the same year, *Suter*, the surviving trustee, by an indenture, to which all the *cestuique trusts* were parties, appointed the Defendant to be sole trustee, in the place of himself and of the deceased trustee; and further executed a conveyance by lease and release for the expressed purpose of vesting the legal estate in the Defendant.

George Adams, the son, was of full age at the date of the will. At the time of commencing this action, all the *cestuique trusts* named in the will were living, and the property had not been divided.

A verdict having been found for the Plaintiff upon the issue affirming the next reversion to be in the Defendant,

Taddy Serjt. moved to set it aside, on the ground, first, that as to the fourth part appertaining to *George Adams*, the legal estate was in *him*, upon the true construction of his father's will; secondly, that at all events it was not in the Defendant, the surviving trustee *Suter* not having conformed to the power in the will which authorised him to convey.

For the first point he relied on *Doe dem. Leicester v. Biggs (a)*, where it was held, that a devise to one in

(a) 2 Taunt. 109.

trust to permit and suffer another to receive, gives the legal estate to the *certain* trust; and though he admitted that, with respect to the three shares allotted to the females of the testator's family, the legal estate might vest in the trustees in order to secure the property to the separate use of the females, — *Jones v. Lord Say and Sele* (b), *Harton v. Harton* (c), — there was nothing to prevent *George Adams* from having the legal estate in his fourth part, pursuant to the decision in *Doe v. Biggs*: he might hold it as tenant in common with the trustees. And if the legal estate in any part of the premises were not in the trustees, the issue, which went to the whole, ought to be found for the Defendant. *Hare v. Cater* (a).

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At all events, according to the power in the will, the surviving trustee could only convey to a new trustee, to hold jointly with himself: for it was evident, that the deviser intended there should never be fewer than two trustees. The conveyance to the Defendant, therefore, not being in conformity with that power, no estate passed to him.

A rule *nisi* having been granted,

Smirke shewed cause. With respect to the conveyance, it is immaterial to enquire whether or not the Defendant has been properly appointed a trustee, for the legal estate is in him at all events by the deed of lease and release. In *Doe dem. Read v. Godwin* (a), the City Lottery Act, 46 G. 3. c. 97., vested the prizes therein enumerated in five trustees by name, in trust for the purposes of the act; and by the sixteenth section it was enacted, that “in case of the death of one or more of the trustees before the drawing of the lottery and the conveyance of the prizes to the fortunate holders of the

(a) 2 Vin. Abr. 262.

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(c) Cowp. 766.

Cas. Abr. 383.

(d) 1 Dowl. & Ry. 259.

(b) 7 T. R. 653.

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tickets, the survivors should, and they were thereby required, to fill up the vacancy or vacancies by the election of some other persons for the purposes of the act." Nevertheless, it was held, in an action of ejectment, that the conveyance of a prize to the lessor of the Plaintiff by four only of the five trustees (one having died), was valid; although it was there contended, that the act made it imperative to fill up the vacancy before any conveyance was made. *Doe v. Keir*(a) also shews that the legal estate passed, at all events, whether the power was or was not duly executed. Besides, the Defendant and *George Adams* being both parties to the conveyance, are estopped to say that no interest passed.

Then, upon the construction of the will, the legal estate vested in the trustees, as well in respect of *George Adams's* share as of the three others. For the trustees are required to discharge outgoings for taxes and otherwise; to let and to keep the whole in repair, and to retain for their expenses: these things they could not do unless they had the legal estate. In *Doe v. Biggs* no such duties were assigned to the trustees; the decision turned entirely on the words by which the estate, whether legal or equitable, was created, and there appear to have been no other provisions in the will that could assist the court in ascertaining the intention of the deviser. *Mansfield C. J.* said, "This case might be argued and considered for ever without advancing it at all in law, reason, or precedent. But, as it happens, in this will the last words are, 'permit and suffer,' which give the *cestuique trust* a legal estate; and the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and, consequently, for want of a better reason, we are forced to say that we think this will gives the

(a) 4 *Man. & Ry.* 101.

legal estate to the party beneficially interested." (*Smirke* was here stopped by the court.)

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Taddy and *Erle* in support of the rule.

The powers to let, to pay outgoings, and to repair, were necessary in respect of those portions of the property which were devised for the benefit of the females. But there is nothing inconsistent in confining the legal estate of the trustees to three fourths, and allowing it to vest in the male devisee as to the other fourth. It has always been a principle in construing wills, to give the beneficial proprietor, if possible, the legal estate; and, though the testator might use the precaution of naming trustees to secure the property of his daughters, he could scarcely have intended to preclude his son, who was of age at the time the will was made, from having full dominion over the property devised to him.

At all events, the conveyance by *Suter* operates under the statute of uses, and therefore must be governed by the intention of the testator. Now it was clearly his intention to avoid the incident of a survivorship, and to give his daughters the security of two joint trustees. In *Doe v. Godwin*, the conveyance did not operate under the statute of uses. If this had been a conveyance under a power in a deed to convey to another jointly with the existing trustee, it had been clearly void; and *Suter* had no power to convey except according to the testator's directions. It is true that here was a conveyance by lease and release, but as that appears by its recital to be in pursuance of the power contained in the will and for the purpose of giving effect to the appointment of the new trustee, if that appointment was defective, the conveyance also must be inoperative.

TINDAL C. J. In this issue, in an action of covenant, the question arises, whether the immediate and

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next reversion of the premises did or did not vest in the Defendant. There are two grounds on which it is contended that the reversion in question did not vest in him: First, it is said, that under the will of *George Adams* the interest devised to the trustees was not a legal interest, but was executed, at least in part, in one of the *cestuique trusts*; secondly, that even if this be not so, the power to convey conferred on the surviving trustee has not been well pursued; and that, therefore, no legal estate has passed to the Defendant.

With respect to the first point, it depends upon what shall appear to be the intention of the testator expressed upon the will; and we cannot give full effect to his intention, unless we say, the use is executed in the trustees. It is contended that if the legal estate, as to any part of the premises, be not in the trustees, that would be sufficient to warrant a verdict for the Defendant; assuming that position to be correct, for the purpose of argument, and confining our attention to the portion devised to the testator's son *George*, the words are, after a devise of the whole to the trustees, — "upon trust, as to one fourth part of the same, to pay to or permit and suffer my said son *George* to have and receive the *clear* yearly rents, issues, and profits thereof, for and during the term of his natural life; and from and after his decease, in trust, as to the same fourth part for the eldest or only son (as the case may be), of my said son *George*, who shall be living at his decease, his heirs and assigns; and if my said son *George* shall not leave a son surviving him, then in trust for such person or persons as at the decease of my said son *George* shall be his heir or heirs, and his, her, or their heirs and assigns."

It is contended, that inasmuch as the testator uses the words, "shall pay to, or permit and suffer my said son to have and receive the rents," the case must be governed

by the decision in *Doe dem. Leicester v. Biggs*, where upon a devise in trust to pay unto, or else to permit and suffer the testator's niece to receive the rents, it was held, that the legal estate was executed in the niece.

It is to be observed, that in that case the court says, that if there be a repugnancy, the first words in a deed, and the last in a will, shall prevail; and that "for want of a better reason" they were forced to say, that that will gave the estate to the party beneficially interested. Here the words are not precisely the same; but "to permit and suffer my said son to receive the *clear* yearly rents;" the trustees were themselves to pay the outgoings: besides which, as to three parts, it was necessary the trustees should take the legal estate for the protection of *Femes covert*; *Jones v. Lord Say and Sele*; and it would be a very anomalous construction of the will to say, that the use was executed in the *cestuique trust* as to one fourth part, and in the trustees as to the other three fourths. How could we reconcile such a construction with the power given to the trustees "to demise the said devised estates, reserving the best rent that can be had?" If *George* were in possession of a fourth, how could the trustees reserve the best rent for the whole of the devised premises? The testator goes on:—"And further, during the continuance of the trust hereinbefore declared of and concerning my said devised real estate, out of the rents, issues, and profits thereof to pay and discharge all outgoings, for taxes or otherwise, in respect of the premises, and to keep the premises in repair." How could they effect this, if a fourth part were in the possession of another person?

Looking at the will, it is impossible to carry into effect the intention of the testator, without saying, that the trustees took the legal estate in the whole of the premises.

The case, therefore, comes within the rule laid down in *2 Wms. Saund.* 11. (note):—"So, where something

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is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate."

Now, when the testator directs the trustees to pay all outgoing, and gives his son *George* the fourth part of the clear rents, what is that but giving him a fourth part of the residue of the rents, after discharging all outgoing? I think, therefore, that the trustees took the legal estate in the whole.

But it is said, that the reversion does not vest in the Defendant, because he takes by a conveyance under a power, and the power has not been duly pursued. Perhaps, upon the death of *Ringham*, another trustee should have been appointed. But when in the conveyance to *Parker* it is recited, that *Suter* had refused to act further in the trusts of the will of *G. Adams*, deceased, and with the privity and approbation of *Catherine Adams*, *George Adams*, party thereto, &c. he had agreed to appoint the said *C. R. Parker*, party thereto, to be a new trustee, in the place and stead of *Joseph Ringham*, deceased; and when it is witnessed, that, for the purpose of vesting the freehold messuages, lands, tenements, and hereditaments devised by the will of the said *George Adams*, deceased, in the said *C. R. Parker*, his heirs and assigns, upon the trusts therein contained concerning the same, the said *Thomas Suter*, by and with the privity, consent, and approbation of the said *C. Adams*, *G. Adams*, &c. and according to the estate and interest of him the said *T. Suter* in the premises, under and by virtue of the said recited will of the said *G. Adams*, deceased, had bargained, sold, and released the premises to the said *C. R. Parker*, how are we

to say in a court of law, that because *Suter* neglected his duty and failed to appoint another trustee, no interest passed to *Parker* by the deed which has been executed? *Suter* cannot say *nihil operatur*, and the *cestuique trusts*, being all parties, are equally estopped. I am satisfied that the conveyance was valid at law, and vested the reversionary interest in *Parker*.

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PARK J. The distinction we now take was taken by Sir *James Mansfield*, in *Doe v. Biggs*; and in *Shapland v. Smith* (a), it was laid down, that if trustees have duties to perform, which require the possession of the fee, the fee is vested in them. In *Doe v. Biggs* they had no such duties, so that that case does not control our present decision. *Kewick v. Beauclerk* (b) proceeded on the same principle, and the rule was there referred to in argument by Serjt. *Williams*.

The very point arises on the will now before us, and I see no reason for making any distinction between the four separate parts of the property. We have only to see whether the final words are applicable to the whole, for they are almost the same as those used by Serjt. *Williams* — “to pay rates and taxes, and keep the premises in repair, or the like.”

GASELEE J. This case differs from *Doe v. Biggs* in many particulars. First the trustees are to apply the clear yearly rents to the use of the several *cestuique trusts*. What can that mean but the clear residue after defraying all outgoings? Secondly, the words relied on in *Doe v. Biggs* were the last words in the will; here they are followed by the clause which requires the trustees to pay the outgoings out of the whole receipts, and to keep the estate in repair. The effect of leaving the legal estate as to a fourth in the son would be to raise a squabble every

(a) 1 Bro. C. C. 75.

(b) 3 B. & P. 175.

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time repairs were to be done. Besides this, *Parker*, after accepting a conveyance from the trustee, is precluded from saying that he had no title to convey. Whether or not a court of equity would order another trustee to be appointed we need not say; but, sitting in a court of law, we are bound to say that the legal estate was in the Defendant at the time of the action.

BOSANQUET J. The question is, did the legal estate in the whole vest in the trustees, or was it, as to a fourth, executed in *George Adams*? The terms of the disposition in favour of *George Adams* resemble those in *Doe v. Biggs*. The terms in that case were, a trust to permit and suffer the testator's niece to receive and take the rents, issues, and profits of the estate devised to the trustees: and if the disposition to *George Adams* had stopped at that point, it would have been difficult to distinguish the cases. But the Chief Justice has pointed out the material difference occasioned by the use of the word *clear* in the present devise: that means, the clear residue after the deduction of all outgoings. According to Sir James Mansfield, in *Doe v. Biggs*, if there be an ambiguity the last words must prevail; and in that case the directions to permit and suffer the *certain* trust to receive the rents were the last words of the devise; and those words, unrestrained, would give the legal estate to the *certain* trust. In the present will those words are followed by many other directions; and amongst others by directions to the trustees to defray charges and make repairs. How could they do that unless they had the legal estate? It seems to me, therefore, that they have in respect of *George Adams*'s share the same estate which it is admitted they have in respect of the shares devised to the females.

Rule discharged.

See *Playford v. Hoare*, v. *Moody*, 3 Bingham. 3. *Doe v. 3 Young & Jer.* 175. *Tenny Scott*, 4 Bingham. 505. *Doe v.*

Walbank, 2 B. & Adol. 554. In the principal case, it may, perhaps, be considered questionable whether, if the legal estate in one undivided fourth part, had, in fact, vested in the son, *G. Adams*, the objection would not rather have been mere matter for a plea in abatement for non-joinder of the other tenants in common, than ground of variance; see *Merceron v. Dowson, 5 B. & C. 479.*

The covenant on which the above action of *White v. Parker* was brought, was a covenant by the lessor and his assigns, to

pay the lessee and his assigns for trees planted and buildings erected during the term, at a valuation to be made by two arbitrators to be appointed by the lessor and lessee, or their assigns respectively, at the expiration of the lease. It seems to have been taken for granted by the counsel for the Defendant, that such a covenant runs with the land: as to which, see *Grey v. Cuthbertson, 4 Dougl. 351.; S P. 2 Chitty's Rep. 482.* and *Selywn's Nisi Prius, tit. Covenant, sect. v.*

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SMITH and Another, Assignees of WHALLEY, April 24.
a Bankrupt, v. CRAMER.

UPON a motion for a new trial on this cause, one question was, whether certain letters written by the bankrupt, *Whalley*, were admissible in evidence in support of an issue which alleged him to have committed an act of bankruptcy on or before the 5th of *March*, 1834.

It was proved that in *December* and *January*, 1834, *Whalley* was in embarrassed circumstances, with an execution in his house: that on the 16th of *February* he left *Stafford*, the place where he resided and carried on trade, and did not return till the 9th of *March*.

The letters in question were written by him on the 16th of *January* to the holders of two bills of exchange, which he was liable to be called on to pay in *February*, and prayed for further time.

A trader, in embarrassed circumstances, absented himself from his house from the 16th of *February* till the 9th of *March*. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of *March*, two letters written by him on the

16th of *January* preceding, asking for time on two bills of exchange payable by him in *February*, were received in evidence to shew the motive of his absence.

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Park J., before whom the cause was tried, received the letters as declarations by the bankrupt, tending to throw light on the cause of his absentsing himself from *Stafford*.

A verdict having been found for the Plaintiff, *Ludlow Serjt.* moved for a new trial, on the ground that those letters were inadmissible, as not having been written at the time of the bankrupt's departure from *Stafford*, or during his absence. In *Lees v. Martin* (a), the declarations of a trader made shortly after an absence, were held not admissible to prove such absence an act of bankruptcy.

Declarations of the bankrupt are only admissible in evidence when they accompany or relate to the act of bankruptcy to be proved.

TINDAL C. J. I think these letters are clearly within that class of evidence under which the conduct and language of the bankrupt previous to bankruptcy have been received in proof to shew the effect of an equivocal act. They were evidence to go to the jury that the bankrupt was a needy man; and also to give a colour to his absence from *Stafford*.

The rest of the Court concurring, the rule was

Refused.

(a) 1 Moo. & Rob. 210.

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See 1 Sc. 56. S.C.

PASSENGER v. BROOKES.

April 24.

*This case last reported (10/20/1941) is now mounted by Bureau.
I wish to thank you for the photos. I add 8A44 8324.*

TO this action of *assumpsit* on a special contract between a timber merchant and a builder, the Defendant pleaded that he did not promise in manner and form as the declaration alleged.

At the trial before *Tindal C. J.*, the Defendant's counsel proposed to prove by evidence *dehors* the contract that there was no consideration for the agreement. But

The learned Chief Justice rejected such evidence, as not admissible under this plea : and

A verdict having been found for the Plaintiff,

Talfourd Serjt. moved for a new trial, on the ground that in contemplation of law the consideration for a promise is parcel of the promise, and therefore, if there be no consideration, there is in law no promise: so that the evidence in question was strictly relevant to establish the proposition, that the Defendant did not promise. Thus, according to the example given in the rules, *Hil. 4 W. 4. Assumpsit*, 1.—“In an action on a warranty, the plea of *non assumpsit* will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach.”

TINDAL C. J. The third example applies more closely to the present case:—"All matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

Upon

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Rule refused.

Talfourd then moved for and obtained a rule *nisi* upon another matter disclosed in an affidavit.

April 25.

ESQUIRE DUKES v. GOSTLING.

Plaintiff declared, that he was possessed of a close and pond; that Defendant, at the time of the grievance complained of, was possessed of a close used as a private road, adjoining Plaintiff's close and pond; and that Defendant wrongfully made in his said close, used as a private road, a sewer near to the Plaintiff's pond, and continued the sewer for a

THE declaration stated, that Defendant demised to the Plaintiff, for a term not yet expired, among other things, a certain close of land, and a pond full of water in and upon the said close, situate in the parish *Islington* in the county of *Middlesex*. That, at the time of committing the grievance by the Defendant therein-after mentioned, the Plaintiff was and still is under and by virtue of the said demise lawfully possessed of the said close of land, with the appurtenances, situate as aforesaid, and of the said pond full of water in and upon the said close: that the Defendant, before and at the time of the committing the grievance thereafter mentioned, was possessed of a certain close of land, *used and employed by the Defendant as a private road*, and adjoining the said close of land of the Plaintiff, and the said pond full of water in the said close; nevertheless, the Defendant, contriving and intending to injure, prejudice, and aggrieve the Plaintiff, and to deprive him of the use and benefit of the said pond full of water, whilst the Plaintiff was so possessed of the said pond of water,

long time, and thereby during all that time diverted the water of the pond:

Held, that the allegation that the Defendant's close was used as a private road at the time of making the sewer was surplusage, which it was not incumbent on the Plaintiff to establish in proof.

to wit, on the 1st of *May* 1833, and on divers other days and times between that time and the time of the commencement of the suit of the Plaintiff against the Defendant in that behalf, wrongfully and injuriously cut, dug, and *made in his said close used as a private road* as aforesaid, a certain large sewer, close to and adjoining the said close and the said pond of water of the Plaintiff, and kept, and continued, and caused to be kept and continued the said sewer adjoining to the said close and pond of water of the Plaintiff for a long space of time, to wit, from thence hitherto; and thereby during all the time aforesaid wrongfully drew off and diverted large quantities of the water of the said pond; and the Plaintiff thereby, for want of sufficient water in the said pond, could not during that time use, occupy, and enjoy his said close and his said pond full of water, as he otherwise might, could, and would, and ought to have done: to the Plaintiff's damage of 1000*l.*

Plea, general issue.

It appeared at the trial that the Plaintiff, a cattle keeper, being, as lessee of the Defendant, in possession of a field with a pond in it, the Defendant, in *April* 1833, obtained permission of the Plaintiff to fill up a portion of the pond for the purpose of making a road to the Defendant's house. The permission was given on condition of the Defendant's abating 10*l.* of the Plaintiff's rent, and leaving a sufficient supply of water for the Plaintiff's cattle.

Before constructing the road, the Defendant built a sewer to carry off the surplus water of the pond in rainy seasons. This sewer ran from the south side of the pond into a drain cut through a field of the Defendant's on the north side; and, after the sewer was completed, the road was carried over it through the northern extremity of the pond.

The depth of the pond when full did not exceed

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two feet and a half; its ordinary depth was eighteen inches.

In order to build the sewer, the Defendant was obliged to drain the pond dry; and, according to the Plaintiff's witnesses, it never again contained a sufficient supply of water for his cattle, notwithstanding the Plaintiff had puddled the bottom to prevent leakage, and at the head of the sewer had erected a cylinder two feet and a half high, with a grating at the top, so that no water could enter the sewer till it was two feet and a half deep in the pond.

The Defendant ascribed the desiccation of the pond to the accident of two dry summers; and his counsel objected that, as the sewer was made before the road, the injury proved did not correspond with the injury described in the declaration.

A verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a nonsuit instead, if the objection should be found available.

Spankie Serjt. having obtained a rule *nisi* accordingly,

Byles shewed cause. The objection is without weight, because, although the defendant's road not having been constructed till after the sewer, he could not have cut the sewer in *his close used as a road*, as alleged in the declaration, yet, the time when the close was used as a road not being specified, it must be taken to be at the time of commencing the action, and then the allegation would be correct, viz., that the Defendant wrongfully made a sewer through a close of the Defendant, which at the time of commencing the action was used as a road.

In *Sir N. Point's case* (a), in an indictment for a forcible entry, it was laid, that such a day and year the Defendant entered into such land, *existens liberum tenementum*

(a) *Cro. Jac.* 214.

of *J. B.*, and with force expelled him; and judgment was reversed, for not saying *ad tunc existens*, for it might be the freehold of *J. B.* at the time of the indictment, and not at the time of the entry. That was confirmed in *Bridge's* case. (a) So in *Rex v. Somerton* (b), an indictment charged that *A. B.*, on a certain day, being the servant of *J. H.*, one gold ring then and there being in the possession of *J. H.*, and being his goods and chattels, feloniously did steal: It was held that the fair import of the charge was, that *A. B.* was the servant of *J. H.* at the time when the theft was committed. To the same effect is *Rex v. Ward*. (c) At all events, the sewer is a continuing nuisance; and the plaintiff may recover for the continuance, notwithstanding he may have misdescribed the premises at its commencement.

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Secondly, the Defendant's close of land, being described by its abuttals as adjoining the Plaintiff's close and the pond in it, the use the Defendant made of his close is immaterial, and may be rejected as surplusage, or might have been amended at the trial, or now: *Hill v. Salt*. (d)

Thirdly, by the new rules of pleading, the Defendant, in an action on the case, by pleading not guilty to the principal charge, must be taken to have admitted all matters of inducement.

Spankie and *Knowles* in support of the rule. The charge is, depriving the Plaintiff of his water by digging through the Defendant's close used as a road; and, whatever occasioned the loss of the water, it was not digging through the Defendant's road. Not guilty, therefore, was the only plea to a charge conceived in such terms; and though that plea should, under the new rules, be held to involve an admission of matters of

(a) *Cro. Jac.* 639.

(c) 2 *Ld. Raym.* 1461.

(b) 7 *B. & C.* 463.

(d) 2 *Cr. & Mee.* 420.

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inducement, still it leaves the Plaintiff to establish the grievance he alleges, that is, the drawing off his water by a cut through the Defendant's road. The shewing that the water had been drawn off by any other cut would not have established that allegation. The cases in *Cro. Jac.* only decided that an indictment was insufficient for want of the word *ad tunc*, but in this declaration it is expressly alleged, that, at the time of the grievance, the Defendant used his close as a road, and that he injured the Plaintiff by cutting a sewer through the *said* close; that is, the close used as a road at the time of the grievance. *Rex v. Somerton* is in favour of the Defendant.

There is a further variance in the allegation of the means by which the water was withdrawn. According to the evidence, it was not withdrawn by the sewer, but previously, and in order to the construction of the sewer. As to the supposed continuance of the nuisance, the grating of the sewer was at such a height as to prevent the improper escape of water after the sewer had been once built.

TINDAL C. J. In this case the Defendant relies on two objections:—first, a misdescription of the grievance of which the Plaintiff complains; secondly, a variance in another material point, namely, that the pond was not emptied by the sewer, but in order to the construction of a sewer for the protection of the road which the Defendant was permitted to make.

It appears to us that the Defendant has been answered. The declaration states, that while the Plaintiff was possessed of his close and pond, the Defendant wrongfully and injuriously cut and made in his close used as a private road, a certain large sewer adjoining the close and the pond of the Plaintiff. But, by way of inducement, the Plaintiff says, that before and at the time of committing the grievance, the Defendant was

possessed of a close of land used by the Defendant as a private road, and adjoining the Plaintiff's close and pond; and this gives rise to the first head of objection, that the Defendant's close was not, according to the language of the declaration, used as a road at the time the pond was emptied, nor till after the sewer was built. The language is indeed equivocal; but it might be open to the plaintiff to explain the ambiguity by evidence, and to shew at what time the close was used as a road, whether at the time of the injury, or at the commencement of the action. However, without deciding that point, it is, at all events, clear that the allegation is immaterial, and does not relate to the gravamen of the action. What has it to do with the wrongful act of the Defendant, or the measure of damages which the Plaintiff is entitled to claim, whether the Defendant used his close as a road, an orchard, or a garden?

If the whole of the inducement had been omitted, the declaration would have been as well without it; we cannot, therefore, allow it to be turned to the defeat of the Plaintiff's claim. Nor, under the new rules of pleading, is it open to the Defendant upon this record to take the objection; for the general issue, not guilty, denies only the commission of the injury, and not the matters of inducement.

Then comes the second objection, that the declaration alleges the pond to have been emptied by the Defendant's making a sewer, whereas the evidence shews it to have been emptied by the steps taken preparatory to making the sewer.

But the Plaintiff complains not only of the emptying of the pond, but of its continuing empty in consequence of what the Defendant has done; and it is clear, according to the evidence, that, since the trench for the sewer was dug, the water has never risen to its usual level. We think, therefore, that the rule for entering a nonsuit must be discharged.

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GASELEE J. If it were necessary to express an opinion as to the time when the Defendant's close is alleged to have been used as a road, I should say the declaration expresses the time when the grievance was committed; but it is not necessary to decide this, for under the new rules the Defendant, having pleaded only the general issue, is precluded from objecting to matters of inducement.

PARK J. concurred.

Rule discharged.

BOSANQUET J. was absent, in the capacity of Commissioner of the Great Seal.

April 28.

POTTS v. SPARROW.

Illegality of consideration must be pleaded specially as a defence, not only where the express contract on which a Plaintiff sues is illegal, but also where illegal services having been performed, no contract to pay for them can be implied.

THE Plaintiff, an attorney, sought, in this action of *assumpsit*, against Sparrow, to recover his bill of costs for preparing an agreement,—by which Jane Stanley, the administratrix of Thomas Stanley, transferred to Sparrow her right to sue John Jones upon an engagement entered into by him with Thomas Stanley, and authorised Sparrow to sue Jones in her name,—and also the costs of the action of Stanley v. Jones (see *ante*, 7 Bingham 369.), which the Plaintiff Potts conducted for Sparrow in Jane Stanley's name, and which failed, on the ground that the agreement between Thomas Stanley and Jones was void for maintenance.

The Defendant Sparrow pleaded *non assumpsit* only.

A verdict was obtained for the Plaintiff Potts, with leave for the Defendant Sparrow to move to enter a nonsuit instead, on the ground that Potts could not recover for services rendered in transferring an illegal contract, and in conducting an action on such a contract; and a rule *nisi* having been obtained accordingly,

9 Clark & Fin 109
8. B. & C. 450.

Comyn, who shewed cause, contended first, that under the new rules this objection ought to have been pleaded specially, and could not be advanced under the general issue; the less so, as some kinds of maintenance are not illegal: Per Lord *Eldon* in *Wallis v. Duke of Portland*. (a)

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The Court here called upon

Talfourd Serjt. and *Dowling*, for the Defendant. By the new rule "all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: *e. gr.* illegality of consideration." The illegality which under this rule is to be pleaded in avoidance, is illegality in the contract which is the subject of an action; but no contract arises in respect of services performed in furtherance of an illegal agreement. The law does not recognise the existence of such services. In an action on the vitious agreement itself, the objection of maintenance could only have been raised by plea. But the Plaintiff here seeks to recover of the Defendant in respect of services rendered to enforce the illegal agreement. The illegality, therefore, of which the Defendant would avail himself, is not the illegality of an agreement, but illegality in the conduct of the Plaintiff which excludes the presumption of any contract between him and the Defendant. He could only plead, therefore, the general issue, that no contract existed. If the court sees that the conduct of a plaintiff is illegal, they will refuse to assist him, whether the defendant points out the illegality or not; as in the case of the highwayman, who filed a bill against his companion, for an account of the proceeds of their joint exploits on *Hounslow Heath*.

(a) 3 Ves. 494.

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TINDAL C. J. That argument would apply where a transaction is affected with usury or any other illegality; and yet I never heard that if the defendant omits to avail himself of the fact, the court is to go on and discover it for him. The question here is, whether under the new rule the defendant should have pleaded the alleged illegality in order to avail himself of it in defence to this action. It has been very acutely put by the learned Serjeant that the rule applies only to cases where the illegality is in an agreement which forms the subject of a suit, and not to cases where the claim is in respect of illegal services, which the employer cannot be called on to pay for; the existence of which is not recognised by the law; and on which, therefore, not even an implied contract can arise. But there are many cases in which the claim in respect of services performed, or goods delivered, would be plainly illegal, and as such would impose on the defendant the necessity of pleading the illegality, although no express contract would be proved at the trial.

Here the defendant relies on the illegality of the contract, and he ought to have put on the record that the several acts in respect of which the plaintiff seeks to recover were illegal.

PARK J. It is not now competent to a Defendant in an action of *assumpsit* to rely on the illegality of the transaction without putting it on record; and that, whether the illegality arise on a statute or at common law. I am not prepared to say that, where there is no such plea, a judge would not be bound to prevent any questions leading to such a defence.

GASELEE J. and VAUGHAN J. concurred.

Rule discharged.

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DAVIES and Wife, Demandants; WILLIAM SELBY LOWNDES, Tenant. April 27, 28.

THOMAS DAVIES and *Elizabeth* his wife, by their attorney, demanded against *William Selby Lowndes* certain manors in the county of *Buckingham*, containing, divers, to wit, 5000 acres of arable land, &c., and divers, to wit, 500 messuages, 500 buildings, &c., with the rights, members and appurtenances to the said manors belonging; and also 50 other messuages, &c., with common of pasture thereunto belonging and appertaining, situate and being in the several parishes of *Whaddon, Great Horwood, Little Horwood, Tottenhamhoe, Shenley, Great Lymford, Mursley, and Bletchley*, and the rectory of *Tottenhamhoe*, with the appurtenances in the county of *Buckingham*, which the said *Thomas Davies* and *Elizabeth* claimed to be the right and inheritance of her the said *Elizabeth*, — by writ of our lord the King of right; and thereupon said, that *Thomas James Selby* deceased, whose heir the said *Elizabeth* is, was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee and right, in the time of peace, in the time of Lord *George* the Third late King of *Great Britain*, within sixty years next before the commencement of this suit, by taking the esplees thereof, to the value of, &c.; and the said *Thomas Davies* and *Elizabeth* his wife further said, that the said *Thomas James Selby* died so seised of the tenements aforesaid with the appurtenances, without leaving any heir, save and except *Erasmus Lloyd* thereafter mentioned; that the said *Thomas James Selby* was the son and heir of *James Selby* *T. J. Selby*, who had no relations of his own name, devised his property to his right and lawful heir at law, (for whom he directed advertisements to be published,) charged with legacies to be paid in twelve months after testator's death; and if no heir was found, to *W. L.*, on condition he changed his name to *Selby*. On the side of his mother and grandmother, the testator had several relations, to whom he left large legacies: Held, that by his lawful heir he meant an heir of the blood of the *Selbys*, and that none such being found, the property belonged to *W. L.*

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who died without any other issue of his body, and without having any heir save and except the said *Thomas James Selby*; that the said *James Selby* was the son and heir of *James Selby*, the grandfather of the said *Thomas James Selby*; which said last-mentioned *James Selby* also died without having any heir save and except the said first-mentioned *James Selby*, and which said *James Selby* secondly mentioned was the son and heir of *Thomas Selby*, by *Mary* his wife, theretofore *Mary Lloyd*; which said *Thomas Selby* died without other issue of his body, and without any other heir by the said *Mary* than the said *James Selby*, secondly above named: and the said *Thomas Davies* and *Elizabeth* his wife, further said, that the said *Mary*, the mother of the said *James Selby* secondly above named, in her lifetime and at the time of her death, was the daughter of *Alban Lloyd* and *Mary* his wife; that *James Lloyd* was the son and heir of the said *Alban Lloyd* by the said *Mary* his wife; and also the brother of the said *Mary* the wife of the said *Thomas Selby*; that *Evan Lloyd* was the son and heir of the said *James Lloyd*; that *William Lloyd* was the son and heir of the said *Evan Lloyd*; and that *Erasmus Lloyd* was the son of *George Lloyd* who was the son of the said *James Lloyd*; and which said *Erasmus* was the cousin and heir of the said *William Lloyd*; and that upon and at the time of the death of the said *Thomas James Selby*, who died so seised without issue as aforesaid, the right of the tenements aforesaid with the appurtenances descended from the said *Thomas James Selby* to the said *Erasmus Lloyd* as the cousin and heir as aforesaid of the said *Thomas James Selby*, who died so seised as aforesaid. That from the said *Erasmus Lloyd*, the right of the tenements aforesaid with the appurtenances, upon his death, descended to and upon *John Lloyd* as the son and heir of the said *Erasmus Lloyd*, and from the said *John Lloyd* the right of the said tenements with the appurtenances,

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upon his death descended to *Catherine, Frances*, and one other *Mary* as the daughters and co-heirs of the said *John Lloyd*; and from the said *Catherine Lloyd* who married *Thomas Julian*, upon her death all her part of and in the said right which came to her as co-heir as aforesaid descended to and upon the said *Elizabeth*, who was wife as aforesaid of the said *Thomas Davies*, as the daughter and heir of the said *Catherine*: and afterwards, upon the death of the said *Frances* all her part of and in the said right which came to her as aforesaid, descended to and upon the said last-mentioned *Mary* and *Elizabeth* as the sister and niece respectively, and co-heirs of the said *Frances*. And afterwards upon the death of the said last-mentioned *Mary*, all her part of and in the said right which came to her as aforesaid, descended to and upon the said *Elizabeth* as the niece and co-heir of the said last mentioned *Mary*; which said *Elizabeth* thereupon and before the commencement of this suit became and was entitled to the whole of the said tenements with the appurtenances as such heir and cousin of the said *Thomas James Selby* as aforesaid; and which said *Thomas Davies* and *Elizabeth* his wife now demand the same, and that such is their right they offer, &c.

Plea, general issue.

The cause was tried at bar.

Talfourd Serjt., Sir *W. Follett*, and *E. V. Williams*, for the Demandants.

The Attorney-General Sir *John Campbell, Kelly*, and *R. V. Richards*, for the Tenant.

The four knights, girt with their swords, and the other twelve recognitors having entered the jury-box, Sir *John Campbell*, after six or seven of them had been sworn, tendered the demi mark.

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Talfourd objected that it ought to have been tendered before any of the recognitors had been sworn. The Court, however, ordered the trial to proceed, postponing the discussion of the objection to a future opportunity, and the rest of the recognitors were sworn.

E. V. Williams, on the part of the Demandants, having then opened the pleadings,

Sir *John Campbell*, on the part of the Tenant, claimed to hold the property under the will of *Thomas James Selby*, of *Whaddon*, in *Buckinghamshire*, who was an orphan at eleven years of age, and died on the 7th of *December* 1772, unmarried. The Demandant's writ was sued out on the 6th of *December* 1832.

Thomas James Selby, by his will, bearing date *August* 10th 1768, and duly attested, among other matters, gave and devised as follows: — “To my *right and lawful heir at law* (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers), all my manors, lands, &c., in *Buckinghamshire* — [in the will particularly described], — to hold the aforesaid manors, &c., to my *heir at law*, his heirs, executors, administrators, or assigns for ever, subject and chargeable nevertheless with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned: that is to say — [among other legacies], — to my cousin *Temperance Bedford* I give 1000*l.*; to Mr. *Franklyn*, who married Miss *Elizabeth Wells*, I give 1000*l.*; and to Miss *Nelly Wells* and Mrs. *Franklyn* (late *Catherine Wells*) I give 100*l.* each; to Mrs. *Ann Kent*, sister to *Temperance Bedford* before mentioned, 1000*l.* All which debts, together with all which legacies, funeral charges, and appointments, I do hereby order and direct

to be paid by the said heir at law, his heir, executor, or assigns, within twelve months after my decease; but should it so happen that no heir at law is found, I then do hereby constitute and appoint *William Lowndes* Esq., of *Winslow*, in the county of *Buckingham*, and now Major in the Militia, my lawful heir, on condition he changes his name to *Selby*: and I give the estates, and all the manors before mentioned, together with all rights, hereditaments, members and appurtenances before mentioned, to the aforesaid *William Lowndes*, subject to and chargeable nevertheless with all the legacies, annuities, debts, funeral charges, and other charges before mentioned. Next I give and bequeath all my tenements or messuages, with their appurtenances thereto belonging, situate and being in *St. Clement's* church-yard, in the parish of *St. Clement's* Danes, *London*; and also all those my messuages, farms, lands and tenements, tithes and hereditaments, and premises, with every of their appurtenances, situate, lying, and being in the Isle of *Ely*, in the county of *Cambridge*; and also all that my manor of *Hertingfordbury*, in the county of *Hertford*, with all rights, members, manors, and appurtenances thereto belonging, together with all farms, lands, tenements, and hereditaments whatsoever, to the Rev. Mr. *John Lord*, and to Mr. *Richard Filkes*, their heirs, administrators, and assigns, in trust that they or the survivors of them, their heirs, executors, administrators, or assigns, do and shall, as soon as conveniently may be after my decease, sell and dispose thereof by public auction.—[The monies to be disposed of to the treasurers of three charities in the will named.]—Next I give to my dear cousin *Temperance Bedford*, of *Husborne Crawley*, daughter of the late *Arthur Bedford*, Minister of *Sharnbrooke*, before mentioned, 1000*l.* over and above what is before recited, this being part of my personal estate, together with all interest

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that is or shall become due; and which 1000*l*. is out at use, and lent by me to Sir *Thomas Alston Bart.*, of *Odell*, in the county of *Bedford*: and I do also give and bequeath to the said *Temperance Bedford* the two pictures of my mother that hang up in my study; also the picture of my grandmother; also an iron-chest, now in the hands of Mr. *Hoare*, my banker, in *Fleet Street*, containing my mother's jewels and some other trifles; and also my mahogany chest of drawers in the dressing-room at *Wandon*, together with my mother's picture and other family pictures; together with all notes, bonds, monies, and whatsoever else is contained in the same. I also give to the aforesaid *Temperance Bedford*, her heirs, executors, administrators, and assigns for ever, after the decease of my dearly beloved Mrs. *Elizabeth Hone*, commonly called or known by the name of *Vane*—[to whom the *Wavendon* estate was devised for life],—all that my dwelling house at *Wavendon*, together with all messuages, farms, lands, tenements, hereditaments, and premises, with their appurtenances, situate, lying, and being at *Wavendon*, otherwise *Wandon* aforesaid, *Apsley Guise*, *Husborne Crawley*, *Heath*, and *Reach*, in the several counties of *Buckingham* and *Bedford*. I do also give and bequeath to the said *Temperance Bedford* the perpetual advowson and disposal of the living or rectory of *Wavendon* aforesaid for ever, together with the tithes of all sorts thereof."

The testator appointed *John Lord*, *Richard Filkes*, and Mrs. *Hone* his executors and executrix.

The testator's father, *James Selby*, married *Mary Alston*, daughter of Sir *Rowland Alston*, of *Odell* in *Bedfordshire*.

The testator's grandfather, *James Selby*, married *Margaret Wells*, daughter of *John Wells* of *Wavendon*.

The testator's great grandfather was unknown.

Temperance Bedford and *Ann Kent*, named in the will, were the daughters of the testator's first cousin *Temperance Alston*, who married *Arthur Bedford*.

Ellen Wells, *Catherine Franklyn*, and *Elizabeth Franklyn*, were the grand-daughters and co-heiresses of *Lionel Wells*, the brother of *Margaret Wells*, the testator's father's mother.

Such being the will and the state of the testator's family,

The *Attorney-General* contended,

1st, That the demandant's claim was too late. The legacies were to be paid within twelve months: as they were charged on the realty they could not be paid till the estate was vested in a permanent owner, who should have the power to mortgage for the purpose, and then, as the testator could not have proposed that the legatees should be kept out of their money for sixty years, he must have intended that *Mr. Lowndes* should become the permanent owner if the undiscovered heir of the *Selbys* did not appear within a twelvemonth.

2dly, *Mrs. Davies* was not even heir at law; for she only claimed from the testator's paternal great grandmother while there were still heirs existing on the part of the paternal grandmother: and *Blackstone*, (2 *Bl. Comm.* 238.) disputes all the authorities which hold that the blood of the paternal great grandmother is entitled to the preference. *Clere v. Brook* (a), *Co. Lit.* 12.; *Lord Bacon's Maxims of the Law*, 16.; *Hale's History of the Com. Law*. 122. *Bac. Abr. Descent*, B.

3dly, Looking to the circumstance that the testator had left legacies to relations on the side of his own mother, and to the co-heiresses of his father's mother, he could

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(a) *Plowd.* 444. to 449. But see 3 & 4 *W. 4. c.* 106. s. 8.

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not be ignorant that there were persons alive who would have answered the description of his heirs, and therefore by the devise to his *right heir* he must have meant an *heir of the blood of the Selbys*.

In support of this position, the Attorney-General read the opinion of Lord *Mansfield* and the Court of King's Bench delivered in *Easter* term 1780, upon the trial at bar (a), of an ejectment brought by the descendants of *Lionel Wells*, brother of *Margaret Wells*, the testator's father's mother, to recover the testator's *London* property; and the judgment of Lord *Loughborough* and the Court of Common Pleas delivered in *Trinity* term 1782 upon a special verdict found at the *Lent* assizes 1781, upon the trial of an ejectment brought by the same parties to recover the testator's *Buckinghamshire* property. (b)

4thly, He relied on a fine with proclamations levied by the devisee *William Lowndes* in *Trinity* term 1784 of the whole estate.

The will of *Thomas James Selby* having been read,

Mr. R. L. Appleyard proved that the tenant was the son of the devisee, *William Lowndes*, named in the will, who died in 1813, and was succeeded in the possession of the estate by the tenant.

The court rolls of the manor of *Whaddon* were then put in, from which it appeared, that from the year 1774 to 1781 the devisee had held courts as lord of the manor, in the name of *William Lowndes*; that no court was holden from 1781 to 1783; that, in *November* 1783, a court was holden in the name of *William Lowndes Selby*; in 1784, in the name of *William Selby*, formerly *William Lowndes*; and from 1784 till the devisee's death, in the name of *William Selby*.

(a) See *post*, 619.

(b) See *post*, 622.

The next evidence adduced, was a decree in Chancery of the 23d of *April* 1779, upon a bill filed in *Easter* term 1778, by Mrs. *Hone*, the executrix of *T. J. Selby's* will, against *William Lowndes* and the several persons who had then set up claims; and upon a bill filed in *October* 1778 by *William Lowndes* against *Samuel Thorne*, *Margaret Wells*, and all others, who up to that time had made any claim to the estates. By this decree, the bills were ordered to be taken *pro confesso* against certain of the Defendants, who did not appear; to be retained for twelve months; and that, in the meantime, the claimants under *Margaret Wells* should be at liberty to bring an ejectment to recover possession of the premises.

By a final decree in these two causes, made on the 28th of *March* 1783, which operated upon all the persons who had then set up claims, the Court “declared the will of the testator, *Thomas James Selby*, well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, which was thereby ordered accordingly; and it was further ordered, that the Master should compute interest on such of the testator's debts as carried interest, and on the legacies, from the time to which interest was computed thereon by the Master's report, and that the same should be raised by mortgage or sale of the testator's estate, called *Whaddon Chase*, *Whaddon Park*, and other lands subjected to the payment thereof by the testator's will, or of a sufficient part thereof, with the approbation of the Master, and as he should direct; and that all proper parties should join in such mortgage or sale as the Master should direct; and it was ordered, that 22,658*l.* 18*s.* Bank 3 per Cent. Annuities, standing in the name of the Accountant General, in trust in the said causes, under the title of ‘*Hone and Medcraft and Lowndes and Wells*,’ which had arisen from the rents

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and profits of the manor, park, tithes, and other estates at *Whaddon*, and were paid into the bank by the said *William Lowndes Selby*, the receiver, should be transferred to the said *William Lowndes Selby*, the parties having agreed to settle the proportions thereof belonging to them respectively between themselves: the Court then declared, that the manor of *Whaddon* and *Nash*, and other the premises devised by the said will to *William Lowndes Selby*, were to be considered as belonging to the said *William Lowndes Selby*; and ordered, that he should be let into the possession thereof, and that all the title-deeds and writings relating to the said estates should be also delivered to him: the Court further declared, that the devises in the said testator's will of the several freehold and leasehold estates thereby given to charities, were void devises, as being within the meaning of the act of parliament of the 9 G. 2.; that such leasehold estates should fall into and constitute part of the general residue of the said testator's personal estate; that the title-deeds and writings of the said testator's estates, lying in *St. Clement's Church Yard* in the county of *Middlesex*, and at *Hertingfordbury* in the county of *Hertford*, should be delivered to the Defendant, *Sir Rowland Alston*, who had recovered possession thereof; and that the title-deeds and writings of the estates, purchased by the testator after the making his will, should be delivered to the Defendants *Ellen Wells* and *Henrietta Franklyn*, and *Elizabeth Franklyn*, who had recovered the possession thereof."

On a trial touching the right to lands, decrees in Chancery between other parties, concerning the same lands, were held admissible in evidence, to shew the character in which the possessor enjoyed the lands.

The Demandants' counsel objected to the reception of these decrees, on the ground that the Demandants were neither parties nor privies to them, but claimed by title paramount; that the decrees were *res inter alios gestæ*; and, for aught that appeared to the contrary,

might have passed by collusion for the purpose of obstructing future claims.

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The Attorney-General. The decrees are not offered as binding on the Demandants, but merely to shew how the tenant came into possession.

Talfourd. *William Lowndes* did not come into possession under the decrees, but appears to have been in possession as receiver some years before.

TINDAL C. J. I see no objection to the decrees being admitted as evidence of the character in which he held the premises: they are not conclusive as to the right. With respect to the objection that they are *res inter alios gestæ*, that is not conclusive against their admissibility; for in actions against the sheriff for an escape, and on other occasions, it is usual to give in evidence judgments against third persons, to shew the character in which the plaintiff claims, and the amount of damage he has sustained.

The decrees having been read, several deeds of purchase were put in, bearing date from 1653 to 1763, by which various portions of the property in question had been conveyed to the testator, his father, and grandfather respectively; also, the will of his father, who died in 1723. Proof was then given that *Temperance Bedford* was a cousin of Sir *Rowland Alston*, whose sister was married to the testator's father; and the tenant's case was closed by putting in the fine with proclamations, levied by his father as *William Selby*, in *Trinity* term 1784, of all the property devised to him by the testator.

On the part of the Demandants,

Talfourd, in answer to the first objection, contended that *William Lowndes* took the estate on condition only,

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and held it as a trustee for the right heir until he could be found; and as the estate was devised subject to the charge for legacies, the right heir, when found, could not have set aside any incumbrance created for that purpose by the provisional owner, so that no delay was necessary for the payment of legacies.

In answer to the second objection, he relied on the old authorities, and the recent statute 3 & 4 W. 4. c. 106. s. 8., which *declares*, as well as enacts, "that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants."

In answer to the third objection, after observing that the decisions of Lord *Mansfield* and Lord *Loughborough* on the will had never been reported, he contended that the devise to the testator's right heir being express and unqualified, the effect of those words could not be got rid of by interpolating the words "of the blood of the *Selbys*," upon grounds of mere conjecture.

As to the fine, if the conusor took the property only on the condition of holding it till the right heir should be found, it did not operate adversely against that heir for whom the conusor was in fact trustee. At all events, a fine with proclamations derives its operation and effect from the supposed notice to all the world. But here the conusor, after holding the estate for some years in the name of *Lowndes*, levied the fine in the name of

Selby; there was, therefore, an entire deficiency of notice as to any fine levied by the claimant *William Lowndes*; and the fine, as legally fraudulent, must be esteemed void. [*Tindal* C. J. The lands are properly described.] This was admitted.

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The Attorney-General now suggesting that, if the Court decided in favour of the Tenant upon the construction of the will, or the effect of the fine, it would be superfluous to go into the Demandant's pedigree,

TINDAL C. J. said, I think it unnecessary this case should go any farther: assuming the pedigree proved, we should, in point of law, decide against the Demandant.

However, upon *Talfourd's* tendering a bill of exceptions, the Court directed him to proceed with the proof of his clients' pedigree.

The Demandants' pedigree was then clearly traced up to *James Lloyd*, of *Monington*, in the county of *Pembroke*, who died about 1670. It was proved that,

James Lloyd's sister, *Mary Lloyd*, married a *Thomas Selby*, of *NeVERN*, in *Pembrokeshire*.

It was alleged that the name of the testator's great grandfather was *Thomas Selby*; and,

In order to shew that the testator's grandfather, *James Selby*, was son of the *Thomas Selby*, who had married *Mary Lloyd*, the Demandants called several old witnesses, and produced an old pedigree of the *Lloyd* family, but relied mainly on the will of *James Lloyd*, bearing date the 3rd of *September* 1669, in which the first bequest was "to *James Selby*, of *Wavenden*, in the countie of *Buckingham*, the son and only issue of *Thomas Selby*, of *NeVERN*, in this countie, by my sister *Mary*, his deceased wife, the sum of fortie pounds." He then bequeathed fourpence to the cathedral of *St.*

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David's, twopence to the church of *Monington*, twopence to the poor of the parish; his messuage and lands in *Dogmells* to his son and heir *Evan*, charged with a payment to his two brothers of eight score pounds, being four score pounds a year to each; to his wife, during her widowhood, the moiety of his messuages and lands in *Monington*; and all his personal estate to his son *Evan*, who was appointed executor to pay debts and legacies.

The inventory of *James Lloyd's* chattels was also put in, the whole of which amounted to no more than 38*l*.

James Lloyd was an attorney; *James Selby*, the legatee, an attorney; and his son *James*, a serjeant-at-law, who acquired a great fortune in his profession, which he had invested in the purchase of part of the property now in dispute.

The will was brought from the registry of the Consistory Court of *Carmarthen*: but the documents there had been loosely kept; several persons besides the registrar had had access to the muniment room; and it did not appear where or by whom the will was first discovered. It appeared to have come first into notice only about four years ago, notwithstanding some search had been made, without effect, in the same office, for wills to assist claimants to the *Selby* estate as long as fifteen years ago. The ancient official index referred to the will of a *James Lloyd*, of *Monington*, who died in 1670.

In the complexion of the paper and ink, and the general character of the handwriting, the will had the appearance of a document of the seventeenth century; but several of the letters, and even some entire words, were in the characters of the present day.

The *Attorney-General* contended, chiefly from its internal evidence, that the instrument was a forgery, and, if so, that the Demandants' pedigree fell to the ground. He suggested, that the original will of *James Lloyd*

might have been abstracted from the registry, copied in *fac simile*, with the interpolation of the remarkable clause describing *James Selby*, and that copy might then have been put in the place of the original: that the description of *James Selby* was too particular to have occurred to any one except for the purpose of this cause; and the legacy to him bore no proportion to the other dispositions in the will.

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TINDAL C. J. Gentlemen of the Grand Assize,— You are summoned this day, upon this writ of right, to determine, by your recognition, whether *William Selby Lowndes*, who is the tenant of the land in dispute, the estate in the county of *Buckingham*, hath more mere right to the property which is the subject-matter of dispute, than the Demandants, *John Davies*, and *Elizabeth* his wife, in right of his wife, have to the same tenements.

The Demandant claims under a pedigree, by which she makes herself out, or rather requires you to find her to be, the heir-at-law of *Thomas James Selby*, the person who was last seised of this estate before any dispute arose. On the other side, the tenant, *William Lowndes*, claims that, as son and heir of his father, who was the devisee in the will of *Thomas James Selby*, he has a right to the possession. And, therefore, two questions of different kinds will come before you, one of which will be a question of fact for your consideration; another will be a question of law for the consideration of the Court; on which, I doubt not, you will take such directions as they shall give you before you come to a decision as to which of the parties has the better right to the tenements in question.

There is no doubt that *Thomas James Selby* was seised of the property in question, and that he died seised on the 7th of *December 1772*. The period of time which the

1835. law allows during which writs of right are capable of being submitted to a court of justice is sixty years; and it appears in evidence that the writ of right in question was sued out of the proper office on the 6th of *December* 1832, that is, one day short of the limited period of time which the law has prescribed. First of all, then, has Mrs. *Davies* made herself out to your satisfaction as the heir-at-law of *Thomas James Selby*, the person last seised? for it is needless to observe, if she has not made herself out by satisfactory evidence as the representative of *Thomas James Selby*, she and her husband can have no right whatever to dispute the possession with Mr. *Lowndes*; he and his father having had possession for a very long period of time, unless the party who claims to disturb and oust him from the possession can shew a legal title as representative of the person last seised, they are to be considered as perfect strangers to this possession; and upon that ground your recognition should be found for the tenant.

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But, on the other hand, supposing Mrs. *Davies* does make herself out as the heir-at-law, through the regular channel, to *Thomas James Selby*, the person last seised, if he, during the course of his life, executed a will, by which he devised his property and put it in a different channel, and the present tenant rightly claims under the devise in this will, then, although the pedigree is amply and completely proved to your satisfaction, the will comes in and interrupts the course of succession.

There is, also, a collateral point which is urged on the part of the tenant of the land, set up as an answer to this action,—that whether his father was or was not described so as to take under the devise, he was in possession in the year 1784, claiming right and title to this land for his own enjoyment and use; that he then levied a fine with proclamations; and that five years having elapsed without any claim on the part of any

stranger, though he may not have had the right originally, he has made that defective title a good one by the legal operation of that fine. Upon this head, the only question for you will be a matter of fact,—how and in what character he claimed the land at the time; whether he claimed it acting for other persons in a subordinate capacity; or whether he claimed an absolute right for himself, insisting that the land was his own: that will be the question of fact for you: then the law will follow, which I shall, with the assistance of my brethren, endeavour to deal with.

Gentlemen, let us come now to the first point of the case, which is a pure question of fact for your consideration,—whether *Elizabeth*, the wife of *Thomas Davies*, has or has not proved that she is the right heir-at-law of *Thomas James Selby*, who died in 1772. (The learned Chief Justice, after stating and commenting on the whole of the evidence in support of the Demandants' pedigree, proceeded,—) If she has failed in her pedigree, then, upon that ground, you are bound to find your recognition in favour of the tenant; but if she has not failed in her pedigree, it becomes my duty to state to you what, in point of law, I consider to be the effect of the devise and the effect of the fine which has been levied on the part of the tenant.

The will in question is that of *Thomas James Selby*, which is dated in 1768. He died in 1772. The question will be, what estate under this will, in the judgment of this Court, did *William Lowndes*, Esq., of *Winslow*, take on the death of the testator? And it is the opinion, not only of myself, but of the other learned Judges by whom I am assisted, that, under the will, the devise was one which, under the circumstances that have happened, and the failure of any heir of the blood of the *Selbys*, vested the fee simple in *William Lowndes*, who was the devisee. It appears that, at the time of making

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this will, the testator had outlived for a very long period both his father and his mother. His father died a serjeant, and, when he died, the testator was little above four years old: his mother died when he was about eleven. Therefore he had not any great opportunities, or perhaps no opportunity, of enquiring into the state of his family. There were some relations of the family living in the neighbourhood; for we have evidence, on the part of the Demandant, of the serjeant having had both a brother and a sister: the sister had married. But it is impossible to read this will, and not to see that he had not, within his own knowledge at the time, any heir of the name of his father's family. That being the state of the case, he begins, after some directions about this will, with this devise: — "Next I give and devise to my right and lawful heir-at-law (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers), all my manor of *Whaddon* and *Nash*." The first question, therefore, is, what is the meaning of the testator in saying "my right and lawful heir?" If these words are taken in their general and unlimited sense, they would denote any heir whatever, either an heir *ex parte paternâ* or an heir *ex parte maternâ*: however remote they might be, it would include any one at whatever distance, so long as they could make out any consanguinity. But these words, though so general in the first devise, we think manifestly cut down and restrained from their general and large sense to a more particular sense, and to denote an heir of the blood of the *Sellbys*. This, we think, is the manifest intention of the testator. In the first place, it would have been a very unnecessary thing, if he had intended to include within the words of this devise heirs of any kind, however remote they might be, to make a devise at all, because the law would have carried the

property to his heir, however distant the heir might be. And when he has said that, he puts in a clause which shews that he must have some desire that this heir should have the name of *Selby*: "should it so happen that no heir-at-law is found, I then do hereby constitute and appoint *William Lowndes* Esq., of *Winslow*, in the county of *Buckingham*, and now major in the militia, my lawful heir, on condition he changes his name to *Selby*."

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These words bring one's mind very far to the conclusion, that the anxiety of the testator was to discover by those advertisements a person of the name and blood of *Selby* who should be his heir; because, in the failure of efforts to discover such a person, he makes and constitutes a stranger to his family his lawful heir, he taking the name of *Selby*, the name of the testator.

But the matter does not rest there; for you also find, to support the inference which may be fairly supposed to arise from this form of bequest, he actually knows that he has persons who would be his heir in the large and unlimited sense, and yet he passes them by, merely giving them a legacy; for in one part of his will he gives a legacy to his cousin *Temperance Bedford*; and afterwards he leaves to the same person an advowson in the county of *Bucks*. In endeavouring, therefore, to discover what the mind of the testator was, we find that he gives, in the largest and most general way, his estate of *Whaddon* to his lawful and right heir: and we find afterwards, that there is a person named in the will who must have been his heir-at-law if no nearer could be found; and it seems, from leaving her a legacy, that he did not mean to include heirs *ex parte maternâ* as well as heirs *ex parte paternâ*; that she is not one of that class or character of heirs which he meant, but of a larger description; therefore, I should say, upon that ground, it is clear that he meant heirs *ex parte paternâ*.

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There are other reasons, one of which has struck the mind of all of us: there is something very singular in the terms of this devise to Mr. *Lowndes*. It is not simply, if any heir cannot be found, he devises to him, but it appears that he designates and appoints him in a very unusual way his heir-at-law. He says, if you cannot find one of the description I am searching for, then I do hereby constitute and appoint *William Lowndes, Esq., to be my lawful heir*: making him, as it were, as the old *Roman* law did, an adopted heir; a person standing in *loco hæredis*, who was not to be ousted till a person having a greater title than himself appeared. And then, when we add to that, there are certain duties to be performed by this heir whom he so constituted, namely, the payment of legacies, the payment of annuities, and the payment of other charges, which charges he makes upon the estate, and which estate it becomes, therefore, essentially necessary that the devisee shall take, in order that he may raise those charges either by mortgage or by sale of that estate, how can we suppose that he meant this to be ambulatory for sixty years; so that, if, during that time, no such heirs appeared, the objects of his bounty would be dead three or four times over? Looking, therefore, at his indications of intention to cut down these words to a more limited and restrained sense, we hold that, upon this will, the heir-at-law to whom he first meant to refer, was an heir of the blood of the *Selbys*; and no such heir having been found, and this Demandant not being such an heir, the devise to *William Lowndes* was a good and valid devise.

I shall not enter into many of the other points; it becomes unnecessary to decide them; as, whether it was necessary, within a year, to make the claim. Nor shall I enter into that very learned question, which has created doubts in the minds of some of the ablest

lawyers which this country has known from that time down to the present; I mean as to the priority of right of succession between No. 10. and No. 11., discussed in the second volume of *Blackstone*.

There is only one point remaining. Upon the evidence, it appears that, for the first two or three years after the death of the testator, there were some proceedings in Chancery; that in the course of these proceedings, Mr. *Lowndes* was appointed a receiver of the property; and that whilst he remained receiver, he held the courts by his own name of *William Lowndes*. I do not think he could have done otherwise: he was acting the part of a public officer of the Court of Chancery. After that, a final decree was made; and from that time the court rolls show, first, an alteration by the addition of *Selly* to his name, and afterwards by his dropping the name of *Lowndes*, and taking that of *Selly* alone. From the decree he was in the receipt of the rents and profits of the estate; and, therefore, the only question of fact is, whether he was receiving those rents and profits at that time, as actually in the dominion of the estate, holding in his own right, and asserting the freehold to be his own; or whether he went on receiving as a person afterwards to be accountable, in the nature of a trustee, to serve other persons. I see no evidence of the latter proposition. It appears to me, that he received that which he conceived and claimed to be his own, and received it in his own name, and appropriated it to his own right. And if that be the case, then this fine, which was levied by him, is a good fine in a court of law; for if he had the freehold in him (whether by right or wrong) when he levied that fine, it was a good fine. If he was a trustee, and had a trust for other persons, I am not prepared to say that that would not be a good fine in a court of law, though a court of equity might hold him still responsible for the persons

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to whom he was trustee. But if you are satisfied he was in the pernancy of the profits, claiming them as his own, that was, in a court of law, clearly a valid fine; after the proclamations, and five years non-claim, that was a bar to all the world; and, therefore, that alone, without reference to any other point, would give a verdict for the tenant.

Where an estate is devised on condition of the devisee's changing his name, it is sufficient if he changes it within a reasonable time, and it is not necessary that he should apply for the royal sign manual.

It has been more than once asked by a learned gentleman of the grand assize, whether the name has been changed in the way which the law prescribes. In this will the condition is, that Mr. *Lowndes* changes his name to *Selby*. It appears, that at first he retained the name of *Lowndes*, while the receivership was going on; and that afterwards he took the name of *Selby* in addition to the other; and I am not prepared to say that that was not changing his name: but at all events he afterwards changed it entirely, and left out the name of *Lowndes*. There is nothing in the will that purports that the condition is to be executed in a very limited or precise time; therefore, though he took it a little later, and though in some particular acts he might use the other name, it would not at all interfere with the general act of changing his name. And there is no necessity for any application for a royal sign manual to change the name. It is a mode which persons often have recourse to, because it gives a greater sanction to it, and makes it more notorious; but a man may, if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his new name as well as he can. Therefore it does not appear to me that that is an objection which can, upon the present occasion, succeed. It is an objection which is quite out of court if the fine has been levied, or if the Demandant has failed in her pedigree; and, in my judgment, and that of my learned brothers, it is equally out of court if this will is one, as we think it is, which

intended only to benefit, first, the heir of the blood of the *Selbys*, and, failing in that, the testator's constituted and adopted heir.

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Such, then, is the case, and therefore, whatever may be the opinion which you may form upon the pedigree, I have no doubt that, when you come to a conclusion upon it, you will still hold that the law we are endeavouring to lay down is the correct law, and that your recognition must be for the tenant.

Talfourd tendered a bill of exceptions to the construction put on the will, and to the ruling as to the effect of the fine; which being accepted, the recognitors were requested to say, first, whether they found that the Demandant had established her pedigree; but, after retiring for half an hour, they returned, finding a verdict generally for the tenant; and declined any separate finding as to the Demandant's pedigree.

It seemed to be agreed both by the counsel and the Court that in a writ of right the jury could not find a special verdict.

Verdict for the tenant.

The following are the decisions pronounced in 1780 and 1781, by the Courts of King's Bench and Common Pleas, upon the construction of *Thomas James Selby's* will (a):—

(a) From Mr. *Gurney's* notes and preserved by the *Lowndes* family.
taken at the time, corrected by
Serjt. *Hill* and Serjt. *Rooke*,

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(In the Court of KING's BENCH.)

DOE dem. ELLEN WELLS and Others v. W. LOWNDES.

April 22,
1780.

Upon a trial at bar of this cause, the pedigree of the claimants being admitted, and that there was no fact controverted between the parties,

Lord MANSFIELD, addressing the jury, said,

The question is a question of construction, analogous to a question of identity; for the whole turns on this,—Whom did the testator mean by “my rightful heir, whom I don't know,—my rightful, lawful heir?” And it is very different from what the case would have been if he had said, I give to Mr. *Lowndes* my estate in case no heir is found; or I give him the estate until an heir shall be found: then Mr. *Lowndes* could retain nothing, if there were any one who could claim by descent: but that is not the case; for here is a gentleman who has estates purchased by his grandfather; estates purchased by his father; and estates purchased by himself: and all of them come within the local description that is the subject-matter of this devise. An heir *ex parte paternâ*, an heir of the blood of the *Selbys*, would certainly take them all. But suppose there is no heir upon the part of the father, and the estate is to go in descent on the part of the mother, grandmother, and great grandmother, who shall be his heirs depends upon the title to the estate. If it be an estate purchased by himself, it goes one way; if purchased by his father, another way; if by the grandfather, it goes another way; because you must go a line back; for the wife can never inherit to her husband, or any body claiming under her: you must go back to

get to the blood. And if that is the case, who is the person here described? for here are three right and lawful heirs when the rule of who is heir is taken from the subject-matter. If I speak of an heir applied to borough *English* lands, I speak of the youngest son; if I speak of an heir in *Kent*, gavelkind; if I speak of the heir general, or an heir in tail, they all take by description from the subject-matter. But this testator describes a person to whom, as his rightful heir, he gives the whole: that places the Court under the necessity of finding out a meaning for this expression, rightful heir; and that is to be collected from circumstances, just as if a father had two sons of the name of *John*, and left property to his son *John*: you must find out from collateral circumstances which he meant. Now, it strikes me, this man meant an heir upon the part of his father; and that he should be of the name of *Selby*; and that appears from various circumstances. In the first place, it appears this gentleman's grandfather and a brother came into *Buckinghamshire* from the north country: they either did not know much of their families, or their families, perhaps, were so obscure and low, they did not publish it in *Buckinghamshire*; but they rose to good circumstances, and a certain degree of consequence in life. Then they rose much higher by means of the great fortune they acquired by the serjeant. But the serjeant had not traced back his pedigree in the north, and nobody was able strictly to find out what his family was, nor to whom they belonged. As to the testator, Mr. *Selby*, he knows very well his relations upon the part of his mother; and he knows his relations upon the part of his grandmother, his grandfather's wife. But the heir in view, the object of his bounty, is a person he does not know, — a person not found, — but a person to find whom he desires advertisements to be put in the paper. The relations he

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did know he did not mean to enjoy the estate if there was no heir preferable to Mr. *Lowndes*; for he knows the *Bedfords*, he knows the *Wells*, he knows the *Alstons*; he gives to some, very bountiful legacies, and he gives to Mr. *Lowndes* the estate unless an heir shall be found. He describes *Temperance Bedford* by the terms of his dear cousin; he describes the Plaintiffs who are now claiming, and he gives them all legacies; and it is admitted in the case he perfectly knew they were his relations. If any of these are his heir, he knew nothing of it, and supposes him a person yet to be found; and unless that heir is found, whom he knows nothing of, *Lowndes* is to have the estate. The inference is very strong, in my opinion, that he meant an heir upon the part of his father; and unless an heir upon the part of his father was to be found, a person he did not know, he meant the estate should go to Mr. *Lowndes*. All the circumstances are admitted; therefore I do not know what to leave for you, but to find a verdict for the Defendant.

The jury found for the Defendant accordingly.

June 1.
1781.

DOE dem. ELLEN WELLS and Others v. W. LOWNDES.

Upon a special verdict found at the *Bucks Lent* assizes 1781, in another ejectment between the same parties, which special verdict set out the will of *Thomas James Selby*,

Lord LOUGHBOROUGH C. J. delivered the judgment of the Court of Common Pleas as follows:—

On the part of the lessors of the plaintiff, it is contended, in the first place, that they are entitled to all the premises under the will, they being the persons described in that

will under the denomination of the right and lawful heir of the testator.

In the second place, it is contended that, if they are not so entitled, yet they are entitled by descent to all the premises, excepting the estate at *Little Harwood* and the leasehold; that they take by descent, as heirs at law, the limitation over to the Defendant, Mr. *Lowndes*, being an executory devise, too remote, and therefore void.

This last point was started, and very ingeniously argued upon the second argument; and at first view, perhaps, there is somewhat specious in it. I will take notice of it first, in order to lay it aside, because it appears to be merely specious. The argument upon that point proceeds thus:—There is in this will a devise to the right and lawful heir and his heirs. There is then a devise to *William Lowndes* and his heirs. This latter devise, it is contended, cannot take effect as a vested estate, because it would be a fee upon a fee; it must therefore be executory, and if it is executory, it is too remote, for the commencement of it is indefinite. The whole of this argument seems to me to be an obvious fallacy. It is said that there is a devise here to the right and lawful heir and his heirs: it is true that there is a clause in the will, respecting the disposition of the estate, prior to the devise to *William Lowndes*; but whether in that clause of the bill there is contained a devise of the estate or not, is the very question in the cause. If the person is ascertained to whom the estate is given under that clause, then it is very clear that no estate is given to *William Lowndes*; not because the devise to him is too remote, but because upon that supposition there is nothing given to him. The prior devise, as it is a little improperly called in the argument, is to a person not named, but described,—whose existence is doubtful, but is not eventual. Whether at the death of the testator there doth or not exist a person to whom the description

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applies, is a certain though it is an unknown fact. If there does exist such a person, nothing is given to Mr. *Lowndes*; if there does not, the estate vests immediately in Mr. *Lowndes*: therefore there is no objection to the legality of the devise to Mr. *Lowndes* in the creation of that devise. Whether it obtains in his favour or not, may not be exactly known at the death of the testator; but it is absolutely certain, if there is a person answering to the description of that clause prior to the nomination to Mr. *Lowndes*, that person takes, and Mr. *Lowndes* never can take. On the other hand, if there is no such person as answers to that description, Mr. *Lowndes* takes, and the estate vests in him. Neither would it make void the devise to *Lowndes*, though it were admitted in the argument, and though it were expressed in the will, that the purpose of inserting his name in the will was to prevent an escheat. The authorities upon that point cited by Mr. Serj. *Hill* are all true. It is true that no estate can be created by a will that is against the rules of law; but there are no rules of law that either by will or deed a grantee or feoffee should not take against the lord.

The case, then, comes entirely to depend upon the first question, and that is, whether the lessors of the Plaintiff are entitled to take under the description of right and lawful heir of the testator, *Thomas James Selby*.

But before I come to consider the parts of the will from whence the exposition of these words is argued upon either side, it may be proper to observe that the common topic of argument from the favour due to the heir at law is totally inapplicable to the present case: the lessors of the Plaintiff are relations to the testator, but they do not claim by descent: in this case they certainly have no legal right to the leasehold estate, and they have as little right to one part of the freehold, a small part, indeed, but still a part of that

which is comprised in the general devise: they, as well as the Defendant, Mr. *Lowndes*, claim, and can only claim, under the will. When they therefore introduce themselves as claimants under the will, it is not just reasoning to talk of the favour that is due to heirs at law. But, perhaps, it would not be quite fair to dismiss this topic without a little more observation upon it. It is an established rule laid down in many and very ancient authorities, that an heir at law is not to be disinherited without express words, necessary implication, or declaration plain. The foundation of the rule is obvious and plain. The right of the heir by descent is certain, and therefore he is not to be disinherited: and the rule always speaks of an heir at law in the character of heir, and, taking by descent. The law gives an estate to the heir if there is no other person to take it; and he who claims in opposition to that clear, undoubted, and certain right must shew a better title: therefore no doubtful, no ambiguous, and no uncertain intent shall take away the clear right of the heir at law. Let us consider, then, in the present case, whether there are any of the contending parties that stand in the situation of the heir at law claiming by descent.

Here is a will produced, to which both parties resort: in that will the name of *William Lowndes* is found; and there can be no hesitation as to his identity:

The only question is, whether the three lessors of the Plaintiff, *Elizabeth Wells* and the two *Franklyns*, are described in the devise antecedent to the devise to *Lowndes*. Unless their title can be made out clear, *Lowndes's* title is clear and certain upon the will. Upon examining the argument upon the interpretation of the clause, we must allow that they are relations, and that they are relations capable of succeeding, and that, therefore, they are entitled that no words shall be strained or forced to exclude them.

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On the part of the lessors of the Plaintiff, the great argument (for all that was urged in the case results to this argument, and supports one or other of the positions contained in it), — the great argument was this: — the testator, it is said, was ignorant who personally was his heir; he was even ignorant to what relation, by the rules of succession, the character of heir would belong; but, whoever the persons, and whatever their right, the testator meant to describe their legal title; and his intention was, that the law should name his heir. Upon this proposition the whole of the Plaintiff's case depends, and it will be necessary to examine the several parts of it. That the testator was ignorant of who personally was his heir, — that he did not know the individual or individuals who were to succeed in that character, — is certainly true, and I take it to be the only certain part of this argument. I rather believe that the testator did not know that there might be some possible relation whose claim would extend to all the lands that either he, his father, or grandfather had acquired, whose right he meant to preserve, to whom it might be necessary to give the leasehold estate, and whom he likewise sought to charge with the legacies. The words he has used are certainly but ill adapted to convey that idea; for a person that I have described would be a person of the blood of the *Selbys*, who would succeed to the entire estate, whether descended from the grandfather, the father, or of his own purchase, and would be the general representative of that family which he wished to establish. But this I state only as a matter of conjecture. I hold it to be certain that the testator did not know who the person was, for he directed means to be used to find out the person. I do not hold it to be certain that the testator was ignorant what right the law threw upon particular classes of relations. But I take it to be by no

means true that the testator meant that the law should name his heir; for I think it is as plain as it can be made by any instrument that the testator has with great anxiety endeavoured to guard against this. One observation on the whole will is, that the idea of family is very strongly marked; continuing the name, and being represented in his possessions, and in his seat in the country; and throughout the whole of the will it certainly would be straining exceedingly, and not only straining, but obliterating a great deal of it, to suppose that in this instrument the least idea prevailed of an intestacy: the law, if the testator meant to refer himself to the law, undoubtedly would name in direct opposition to that which is his manifest intent: the law would sever that property which he wished to unite: the law would, for instance, take an acre from the park, and give it to different persons, — the law would sever the fish-ponds, for they are upon the leasehold premises, — the law would disunite the farm, which it is manifest it was his object and intent to keep united in one hand, namely, the person who was to be his representative.

Another thing is extremely strong upon that part of the case. The lessors of the Plaintiff come here as heirs at law upon the part of the grandmother; they come to claim under the description in the will all that is comprised in the devise. The foundation of their title is, they are so related as to be his heirs at law on the part of the grandmother: but it is obvious that there is another person to whom a part of the premises comprised in this devise must, exactly upon the same proposition and the same argument, belong, because they are not heirs at law of the grandfather, and to that part of the estate which descends from the grandfather they can set up no title. What becomes of that part of the estate? Does it escheat? will Mr. Lowndes take it, if

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Mr. *Lowndes* stands in the place of that heir at-law of the grandfather who would take the whole of the estate? The value of those premises is small; but the value of them does not at all alter the argument if he stands in the place of the heir at law with regard to that part of the premises. Then there are two parties; the heirs at law, on the part of the grandmother, who say, His estate belongs to us, because, if there had been no will, it would descend to us. On the other hand, there stands Mr. *Lowndes* claiming the other part of the estate. The lessors of the Plaintiff say they are entitled to it. Why so? only because the greater part of the estate is of that nature that, if there had been no will, it would have descended to them. Is it to be in average between them when there are two persons whose claims are thus equally balanced, and who neither could qualify any right with respect to leasehold estate? Upon what ground is the Court to say it shall go in average between them?

Upon all these observations, it seems, therefore, that in this will *right and lawful heir at law* cannot possibly mean *every* heir at law. It is contended it would be the heir on the part of the father, though the heir on the part of the mother would be nearer related to the testator. Why? not because the heir of the mother could not be entitled to take by any course of legal descent. Is it more applicable to the heir on the part of the grandmother? The heir on the part of the grandmother is just as much excluded from claiming any part of the estate which comes from the paternal grandfather as the heir on the part of the mother is precluded from claiming any part of the estate which came from the father. The only person to whom this description seems in all its parts applicable, is the heir on the part of the paternal line, the heir of the blood of *Selly* who would be; in the common and ordinary acceptance of the word, in the

general sense of the country, the representative of the family of the *Selbys* in whose favour it is probable he meant this devise should operate, and for whom he meant to keep the leasehold estates connected with the freehold, and charged the payment of the debts and legacies out of the estate. I say no more than that it is probable, because it is not necessary to carry that argument further; for it must not be forgot that the lessors of the Plaintiff are now called to maintain their right; that they must shew against a clear and specific devise to a person named, of whose identity there can be no doubt, that they come under the words of the will; and, in my apprehension, the argument that is attempted to support their case does not make it out with clearness, with certainty, and with that conviction that is necessary to establish a title against another which undoubtedly is clear.

However, the Defendant's counsel don't leave the matter upon the imperfection of the argument urged on behalf of the lessors of the Plaintiff, for they undertake to shew, on the behalf of the Defendant, that negatively the lessors of the Plaintiff cannot be the persons meant in this will; and there are two circumstances by which they contend that that proposition is made out with a very strong degree of evidence. In the first place, they say, and nothing can be more certain, that the person to whom the testator meant to apply the description of right and lawful heir at law was one whose person was unknown to him; for he directs that advertisements should be published, immediately after his decease, for the better finding out of that person. Then he is there describing one of whose possible existence he had some idea, but of whose actual existence he knew nothing. Now, that, they say, never can apply to the lessors of the Plaintiff, because the lessors of the Plaintiff he undoubtedly knew, and one of them,

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Elizabeth Wells, is mentioned by name in the will; and, though the names of the other two are not mentioned, yet their mother's name is mentioned. Their father is described, and described by the circumstance that explains his connection with the testator; he is described as the husband of *Elizabeth*: the female who is in the same degree with them, and married a person of the name of *Franklyn*, is also named in the will. The object of the inquiry the testator directed to be made was, not to ascertain a point of law, but to discover an unknown person; and it would be ridiculous to suppose he had directed advertisements to find out that which he extremely well knew. The object, therefore, of this description must be some other person than those who were before his eyes, and whom he names. When the testator comes to make a devise in favor of *Lowndes*, he takes care and is anxious that *Lowndes* should assume the name of *Selby*: there is a positive direction in the will that *Lowndes*, whenever he becomes entitled, shall take the name of *Selby*. Now, if the testator could have conceived that there was any event in which *Elizabeth Wells* and the *Franklyns* might be entitled to claim under the will, it is inconceivable that he who was anxious to make a gentleman abandon his own name, should not be equally anxious to make those assume that name under which he intended the representation of his family should continue. But, besides this, there is another circumstance in the will which the Defendant's counsel contend, and it seems to me unanswerably, makes it still more clear that the testator negatively did not intend that the lessors of the Plaintiff should be the representatives of his family in possession of his estate, managing that estate, and of course, as the heirs of that estate by the will, executing his will with regard to that estate. To *Elizabeth Wells*, and to the *Franklyns*, there are two legacies given; those legacies are charged upon

this estate. The mere circumstance of giving legacies charged upon an estate will not, perhaps, of itself be sufficient to shew that the legatees could not in any event take the estate out of which the legacies are to issue. But this is not all ; the testator has proceeded to give several legacies, and directs that they shall be paid within twelve months, which is the usual time at which legacies are made payable ; he directs that they shall be paid by his heir at law within a twelvemonth after his decease ; but if it should so happen that no heir at law should be found, he then appoints Mr. *Lowndes* his lawful heir, upon condition that he changes his name ; and he gives him the estate charged with those legacies. It is clear, therefore, that the testator supposed a case in which Mr. *Lowndes* might be the person to pay the legacies to *Wells* and to the *Franklyns*. Now, that case could not by possibility exist, if *Wells* and the *Franklyns* were the persons to answer the description of his right and lawful heir, because they would take the estate ; the estate would not come to Mr. *Lowndes*, and Mr. *Lowndes*, therefore, could never be in the situation which the testator has supposed to be a situation likely to happen within a short compass of time. From these circumstances, the counsel for the Defendant contend, and their argument seems to me well founded, that there is sufficient evidence to shew negatively that the heir could not be the lessors of the Plaintiff. The other part of the argument seems to me to shew that the lessors of the Plaintiff have not been successful to make out the point that they are the persons intended : the utmost of the argument would be probable conjecture, not very certain, and which, in such a case, ought not to prevail against a clear title. Mr. *Lowndes's* title is a clear one, unless another be found to bar it ; therefore the Court, upon the whole, are of opinion judgment ought to be for the Defendant.

Judgment for Defendant accordingly.

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DAVIES and
Wife,
Demandants ;
Lowndes,
Tenant.

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April 30.

Ex parte BOWLES's Trustees.

A charge for searching for judgments, will not render an attorney's bill taxable under 2 G. 2. c. 23.

WHITE applied to refer to the prothonotary to be taxed, an attorney's bill for the expense of certain settlements and conveyances, on the ground that the bill contained charges for searching for judgments: these charges, he contended, were disbursements at law under 2 G. 2. c. 23. s. 23.: and he relied on *Wilson v. Gutteridge* (a), where preparing a warrant of attorney was held to be a taxable item, the Court of King's Bench saying they had a general jurisdiction, independently of the statute, to tax an attorney's bill.

Sed per Curiam. That case has been over-ruled by *Fenton v. Correa* (b); and it has been held in *Clutterbuck v. Combes* (c), and a long list of cases, that the Court has not a common law right to tax an attorney's bill. It cannot be said, that searching for judgments is a charge or disbursement at law or in equity under the statute 2 G. 2. c. 23.

Rule refused.

(a) 3 B. & C. 157.
(b) Ry. & Moo. 262.

(c) 5 B. & Adol. 400.

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BARNETT v. GLOSSOP.

May 1.

THE Plaintiff sued in *assumpsit* upon an alleged bargain and sale of his copyright in a dramatic composition, entitled "*Victorine, or, I'll sleep on it*," to the Defendant, the manager of a suburban theatre. The declaration also contained a count on an account stated.

The Defendant pleaded that he never promised *modo et formâ*.

At the trial before the Undersheriff, it was proved that the Defendant agreed to give 15*l.* for the piece, but afterwards repudiated it.

There was no written assignment of the copyright; and it was objected, on behalf of the Defendant, that, without such an assignment, the piece could not be said to have been sold to the Defendant, the statute 3 & 4 W. 4. c. 15., prescribing that the author of any dramatic piece shall have, as his property, the sole liberty of representing it, or causing it to be represented at any place of dramatic entertainment, and the statute 8 Ann. c. 19. s. 1. having enacted, that no bookseller, printer, or other person whatsoever, shall print, reprint, or import, or cause to be printed, reprinted, or imported, any book or books, without the consent of the proprietor or proprietors thereof first had and obtained in writing.

The Undersheriff thought that, under the new rules, the objection could not be taken unless it were specially pleaded. Whereupon the Plaintiff had a verdict for 15*l.*, with leave for the Defendant to move to set it aside and enter a nonsuit instead, if the Court should be of opinion that the objection could be taken under the general issue.

In *assumpsit* for the price of a copyright bargained and sold, a defence on the ground that the copyright was not assigned in writing, must be specially pleaded.

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A rule *nisi* having been granted to that effect,BARNETT
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Dowling, who shewed cause, relied on the rule *Hil. 4 W. 4., Assumpsit 3.* "In every species of *assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

Thomas, in support of the rule. The evidence in question ought to have been received in support of the plea that the Defendant did not promise in the manner alleged in the declaration. For the law presumes *omnia rite acta*; and, therefore, it must be intended that the bargain and sale on which the Plaintiff declares is a valid and binding contract. But, without an assignment in writing, there can be no valid transfer of a copyright in a dramatic composition; 8 *Ann. c. 19. s. 1.*; *Power v. Walker (a)*; the Defendant, therefore, did not promise in the manner alleged in the declaration, which implies a promise upon a binding contract. In the eye of the law he made no promise at all, for he made none which the Plaintiff could enforce: and yet the transaction between the Plaintiff and Defendant was neither void nor illegal; so that it would have been inaccurate to have pleaded, in the language of the new rule, nullity, want of consideration, or illegality of consideration: the transaction was legal as far as it went; the proposed consideration was good; and the Plaintiff only failed from having omitted to clothe his contract with the formalities required by law.

The Defendant, by pleading he did not promise, casts it on the Plaintiff to prove that he did; the Plaintiff

has failed to establish that by the proof which the law requires, and, therefore, must be nonsuited. Upon the same plea to an action on an attorney's or apothecary's bill the plaintiffs would fail, the one, if he omitted to prove that his bill had been duly delivered, the other, that he was duly authorised to practise. If, under the new rules, the Plaintiff had been compelled, where the law requires a contract in writing, to state in his declaration whether such writing exists or not, and to set it forth if it exists, it might be proper to call on the Defendant to state specifically in his plea the objections to be alleged to the contract; but it will be a great hardship on a defendant to call on him to state such objections in answer to a general declaration; for he may have forgotten whether the contract was reduced to writing or not, or whether the writing, if it exists, contains the legal requisites for its validity. It could never have been intended to place defendants under such a disadvantage; and, therefore, the Court will not put on the new rule the construction for which the Plaintiff here contends.

TINDAL C. J. It appears to me that, upon the right interpretation of the new rules of pleading, the defence now relied on should have been put on the record. The words of the rule are, "All matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." The general issue, therefore, is to operate only as a denial in fact, and not in a matter of law.

In this case the Plaintiff declares, that he bargained and sold his copyright in a certain dramatic composition to the Defendant; and the answer, upon the plea of *non assumpsit*, is, that, looking to the statutes of

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8 *Ann. c. 19.* and 3 & 4 *W. 4. c. 15.*, the inference from both is, that there cannot be a valid transfer of property in a dramatic work without a writing. That is not a denial, in fact, of the existence of the contract, but a claim to be discharged from the contract, because the formalities which the law has prescribed have not been observed. Such a kind of discharge is exemplified by the instances given under the third rule; *ex. gr.*: "Infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law; drawing, indorsing, accepting, &c. bills or notes by way of accommodation; set-off, mutual credit, unseaworthiness, concealment, deviation." What is this defence, but that the formalities required by statute to make the contract legal have not been complied with? I think, therefore, that no answer has been given to the evidence by which the Plaintiff has established his case, and that this rule must be discharged.

PARK J. The new rule has expressly limited the effect of the plea of *non assumpsit*, so as to render it no longer a general issue, involving matter of law as well as matter of fact, but a mere denial of matter of fact; and all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, must be specially pleaded. The object of the rule was, that neither party should be taken by surprise, and that object would be defeated if we were to yield to the argument that has been urged for this Defendant. If the objection now insisted on had been put on the record, no judge would have sent this case to the under-sheriff.

GASELEE J. I am of the same opinion. This is a defence that ought to have been pleaded. The cases

cited on the part of the Defendant have no direct application to the present question; they have established, that the purchaser of literary works is not an assignee entitled to sue as proprietor, unless he be clothed with a statutory title; but they tend also to shew, that an oral contract for the transfer of such works is illegal; and if so, under the new rule illegality in a contract must be pleaded.

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BOSANQUET J. I agree with the rest of the Court, and should have been very sorry if we had felt it necessary to decide otherwise. The object of the new rule was, to provide that all legal defences should be put on record. The general issue, except where it is prescribed by statute, may be considered as put an end to, and the denial expressed by *non-assumpsit* is confined to denial of matter-of-fact. The declaration in the present case suggests a good cause of action at common law; but it is objected, that by the provisions of a statute, the Plaintiff is, under the circumstances of the case, deprived of the benefit he possessed at common law; that brings the Defendant within the rule which has confined the operation of *non-assumpsit* to the denial of the fact of the contract; and "all matters in confession and avoidance, including not only those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." This is a case, therefore, in which a cause of action, available at common law, is rendered unavailable by the provisions of a statute, and that is a defence which ought to be put on record.

Rule discharged.

1835.

May 1.

DENNETT v. PASS and Another.

Where costs were ordered to be paid to the Defendants or their attorney, a demand by their attorney in the country was held sufficient to authorise an application for an attachment to enforce payment, notwithstanding the agent of the attorney in the country was the attorney on record.

BY a rule made in this cause costs were ordered to be paid to the Defendants, or their attorney. The Defendants' attorney on the record was *Taylor*, the *London* agent of *Wagstaffe*, who was the Defendants' attorney in the country. *Wagstaffe* having demanded the costs in question, an attachment was issued to enforce payment, when *Atcherley* Serjt. obtained a rule *nisi* to set aside the attachment, on the ground that the demand should have been made by *Taylor*, the attorney upon record, being the only person who could answer the description of Defendants' attorney within the meaning of the rule for the payment of costs.

Taddy Serjt., who shewed cause, contended that the attorney in the country answered that description better than the *London* agent; notwithstanding the latter happened to be the attorney on record.

Atcherley referred to *Hartley v. Barlow* (a), where it was held, that an attachment for contempt in not paying money to a party or his attorney, pursuant to the master's allocatur, could not be supported on an affidavit stating a demand of the money by the attorney's clerk.

TINDAL C. J. It appears to me, that the attorney in the country comes within the meaning of the rule which directs that the costs shall be paid to the Defendants or their attorney. In the common phrase, he is the

(a) 1 *Chitty*, 229. See also note, *ibid*.

attorney who conducts the action. Usually the rule is for payment to the party or his attorney or agent; if that had been the language here, no one can doubt that *Taylor*, though the attorney on the record, would fall within the description of agent, and *Wagstaffe* within the description of attorney. As to *Hartley v. Barlow*, the case is materially distinguishable: for the demand there was made by the managing clerk upon a rule which only authorised payment to the attorney. The managing clerk might be a person unknown to the party; the attorney in the cause cannot be changed without the sanction of an order of the Court.

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PARK J. I agree with the decision in *Hartley v. Barlow* for the attorney's managing clerk could not be said to satisfy the description of attorney or agent. Here the Defendant's attorney lived in the country, and it would be too much to call on his *London* agent to take a journey for the purpose of making the demand.

GASELEE J. The applicant has not ventured to say that *Wagstaffe* was not the Defendants' attorney.

BOSANQUET J. concurred.

Rule discharged.

1835.

May 1.

BOULTON v. COGHLAN.

The Defendant pleaded, that a promissory note on which the Plaintiff declared, was made by Defendant in December 1833, in pursuance of an agreement thereby to secure to J. A. money lost to him at play in July 1833 :

Held, that this plea was not supported by evidence, that in July 1833 Defendant gave J. A. a bill of exchange, payable six months after date, for 87*l.* ost at play, which bill J. A. endorsed to V. K., and that in December 1833 Defendant substituted for this bill of exchange a promissory note for 100*l.*, bearing date September 1833, and payable to the order of V. K. six months after date, being the note on which the Plaintiff sued.

TO an action on a promissory note for 100*l.*, made by Defendant on the 12th of September 1833, payable to the order of V. Knight six months after date, and by Knight indorsed to the Plaintiff,

The Defendant pleaded, that before the making of the promissory note by him, to wit, on the 23rd of July 1833, and on divers other days afterwards, the Defendant did on each of those days at one time lose to one John Aldridge, and the said J. Aldridge did on each of those days at one time win of the Defendant, a certain sum of money amounting in the whole to a large sum, to wit, the sum of 100*l.*, by gaming and playing at a certain game, to wit, a game called *French Hazard*, contrary to the statute in that case made and provided : and the said sum having been won and lost, and remaining due and unpaid, to wit, on the 12th of December 1833, it was agreed between the Defendant and the said J. Aldridge that the payment thereof should be secured by the promissory note of the Defendant, to be by him made, and whereby he should promise to pay 100*l.* to the order of the said V. Knight as for value received six months after the date thereof ; and the Defendant averred that, in pursuance of the said agreement, the Defendant, to wit, on, &c., made the said promissory note, and thereby promised to pay 100*l.* to the order of the said V. Knight as for value received six months after the date thereof, for securing the payment, by the Defendant, of the said sum so won and lost as aforesaid ; and the De-

Defendant averred that the said promissory note so made as aforesaid, was and is the same identical promissory note in the declaration mentioned, whereby and by force of the statute in such case made and provided, the said promissory note was and is void; and that, the Defendant was ready to verify, &c.

The Defendant pleaded, secondly, that there was not, at any time, any consideration or value for his, the Defendant's, making the said promissory note, or paying the amount of the said note, or any part thereof. That the said *V. Knight* indorsed the said note to the Plaintiff without any value or consideration for so doing; and that the Plaintiff held the said note without any value or consideration for his having been or being the holder thereof.

Replication. That the said promissory note was not made by the Defendant in pursuance of the agreement in the said first plea mentioned for securing the payment by the Defendant of the said sum in that plea mentioned. That the said indorsement by the said *V. Knight* to the Plaintiff, was made before the said promissory note became due and payable, to wit, on the 6th of *February* 1834, and that the said *V. Knight*, then being the holder of the said promissory note, delivered the same to the Plaintiff with the said indorsement thereon, for a good and valuable consideration before and then given by the Plaintiff to the said *V. Knight* for the same; that is to say, for and in respect of the said *V. Knight* being then indebted to the Plaintiff in a large sum, to wit, 200*l.* for the work and labour of the Plaintiff by him done and performed as an attorney and solicitor and otherwise for the said *V. Knight* upon his retainer and at his request; and for money paid, laid out, and expended by the Plaintiff for the said *V. Knight* at his request.

At the trial, it appeared that, in *July* 1833, the De-

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Defendant pursuant to an agreement with *Aldridge*, upon balancing an account of losses at play, had accepted a bill of exchange for 87*l.*, payable six months after date, and drawn on him by *Aldridge* as a security for money lost by the Defendant to *Aldridge*, at play. *Aldridge* indorsed the bill to *Knight*.

In *December* following, by agreement between the Defendant and *Knight*, the promissory note on which the Plaintiff sued was substituted for this bill of exchange, and subsequently indorsed by *Knight* to the Plaintiff.

It was objected, on the part of the Plaintiff, that this evidence did not substantiate the allegation in the plea, and ought not to have been received; for it was not the promissory note, but the prior bill of exchange that the Defendant agreed to give as a security for the money lost to *Aldridge*.

The jury found that the Plaintiff gave a good consideration for the note, but that the note arose out of a gambling transaction, of which the Plaintiff was ignorant; whereupon

A verdict was taken for the Defendant, with leave for the Plaintiff to move to set it aside, and enter a verdict for the Plaintiff upon the above objection, and another on which no decision was pronounced.

A rule *nisi* having been obtained accordingly,

Talfourd Serjt. and *Chandless* shewed cause.

The allegation in the plea was substantially proved. No doubt, the original agreement was to give a bill of exchange for the money lost at play; but the bill was not payment: it was given up before it became due, and the promissory note substituted for it. Upon that substitution, the previous illegal agreement on the bill of exchange became engrafted into the note, for which there was no consideration but a gaming debt.

TINDAL C. J. We are all of opinion, that evidence of the agreement between the Defendant and *Aldridge* was not admissible under this plea. The plea states, that the Defendant, having lost money at play to *Aldridge* in *July* 1833, it was agreed between them, in *December* following, that the payment should be secured by the Defendant's promissory note, payable to *Knight* six months after date, and that the note made in pursuance of that agreement is the note set out in the declaration.

To which the replication is, that the said promissory note was not made by the Defendant in pursuance of the agreement in the plea mentioned for securing the payment by the Defendant of the sum in the plea mentioned. That involves a denial, both of the making of the note, and of its being made in pursuance of the agreement between the Defendant and *Aldridge*. Now it appears on the evidence, that the instrument given by the Defendant to *Aldridge*, upon balancing an account of losses at play, was a bill of exchange, drawn before the making of the promissory note which is the subject of the action, and having a different six months to run; and that, before the bill of exchange became due, a promissory note was substituted by the Defendant, for a different sum, and having a different six months to run. The agreement, therefore, as to the promissory note, was not the agreement originally made, but a new and substituted agreement; and, if evidence of it be let in, it gives the Defendant the opportunity of resorting to two separate agreements, under a plea which specifies but one. That might operate as a hardship on the Plaintiff, by making it difficult for him to decide on the evidence with which he should be prepared in answer. Suppose the first agreement had been for a bond, and the substituted agreement for a promissory note; or the first for a bond, and the substituted agree-

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ment for a chattel to be delivered in satisfaction. Such agreements would, being of an entirely different nature, occasion a surprise to the opposite party, if they were allowed to be shewn in evidence under a plea referring only to one of them; indeed, a Defendant might be let in to prove a whole series of substitutions, if admitted to prove this. We think, therefore, the Defendant should have pleaded the substituted as well as the original agreement, and that, therefore, this rule must be made

Absolute.

The Court refused to permit the Defendant, upon payment of costs, to amend his plea and go down to another trial.

May 2.

BRADLEY v. MILNES.

To a plea, that work in respect of which Plaintiff sued, was not, according to agreement, done to the satisfaction of Defendant or his surveyor; Plaintiff replied, that it was done to the satisfaction of Defendant and his surveyor; without this, that it was not done to the satisfaction of Defendant or his surveyor:

ASSUMPSIT for work and labour, and materials found.

The Defendant pleaded that by an agreement between Plaintiff and Defendant, the sum now demanded was to be paid by the Defendant upon the Plaintiff's completing a building for the Defendant, to the satisfaction of the Defendant or to the satisfaction of the Defendant's surveyor; and that the building had never been completed to the satisfaction of the Defendant or to the satisfaction of his surveyor.

Replication, — That the building was completed to the satisfaction of the Defendant, and to the satisfaction

Held, that upon this issue it was sufficient to shew that the work was done to the satisfaction of the Defendant.

of his surveyor; without this, that it was not finished to the satisfaction of the Defendant, *or* to the satisfaction of his surveyor.

Upon which the Defendant joined issue.

At the trial the Plaintiff proved that the building had been completed to the satisfaction of the Defendant.

A verdict having been found for the Plaintiff,

Acherley Serjt. obtained a rule *nisi* to set it aside on the ground that evidence of the satisfaction of the Defendant alone did not sustain the issue raised by the replication.

Talfourd Serjt. shewed cause. The plea being in the alternative, the substance of the issue has been proved. In *Jones v. Clayton* (a), where the Plaintiff declared against the sheriff for a false return of *nulla bona* to a *fi. fa.* against the goods of *R.* and *J. S.*, and alleged that "although *R.* and *J. S.* had goods, &c. within his bailiwick, &c., yet Defendant did not levy the debt and damages aforesaid, but did falsely return that the said *R.* and *J. S.* had not, nor had either of them, any goods or chattels whereof he could levy the said debt and damages, or any part thereof," that allegation was held to be sustained, although Plaintiff did not prove that *J. S.* had any goods; for it was severable that both or either of them had goods, &c. So in *May v. Brown* (b), where, in a declaration on a libel, the Plaintiff, after adverting to several matters in the way of inducement, alleged that the Defendant published the libel concerning the Plaintiff and the matters aforesaid, and it turned out that the libel related to some only of those matters, *Abbott C. J.* said, "It was contended that the Plaintiff had, by the form of his declaration, rendered it necessary for him to prove (though otherwise it would have

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(a) 4 M. & S. 349.

(b) 3 B. & C. 113.

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been unnecessary), that the libel does relate to all the matter previously alleged; that, by the averment that the Defendant published a libel 'of and concerning the matters aforesaid,' he had rendered it necessary for him to prove *all* the matters aforesaid to be matters to which the supposed libel related. I am, however, of opinion, that the allegation does not compel the Plaintiff to prove formally and precisely that the libel relates to every part and particular of the matter so previously stated, but that it satisfies all he has taken on himself to prove, if he shews that the libel relates *substantially* to the matters previously alleged by way of introduction, in such a manner as that the defamation contained in the libel is of the character and effect which the Plaintiff has described." The same principle was established in respect of a plea, in *Spilsbury v. Micklethwaite* (a), where it was held that if a plea of justification consisted of two parts, each of which would, when separately pleaded, amount to a good defence, it would sufficiently support the justification if one of those facts were found by the jury. In *Co. Lit.* 282. a., it is laid down, "If the matter of the issue be found, it is sufficient."

Here the Court called on

Atcherley to support his rule. According to the declaration and the plea, the Plaintiff might in his replication have taken issue on the satisfaction of the Defendant or of his surveyor; but having taken upon himself to aver the satisfaction of both, he does not sustain his issue unless he proves the satisfaction of both.

The first part of the replication tenders the substantial issue, and not the formal traverse with which it

(a) 1 *Taunt.* 146.

concludes: when the *absque hoc* is only the negation of a negation, the substantial issue is in the preceding affirmation. In *Moore v. Boulcot* (a), to an action on an attorney's bill, Defendant pleaded that the bill was for work at law and in equity, and was not delivered to her a month before action. Replication, that the bill was not for work at law and in equity, was held ill. [*Tindal* C. J. There the next step was a demurrer.] In *Goram v. Sweeting* (b), where the Plaintiff declared that the ship, tackle, &c., were sunk and destroyed, it was held, that if the Defendant traversed it, the traverse must be in the *disjunctive*, and not in the *conjunctive*.

To the same effect is *Wood v. Budden*. (c) And this is not a case in which the Judge has power to amend under 3 & 4 W. 4. c. 42.: *Hanbury v. Ellar*. (d)

TINDAL C. J. it appears to me that there are no grounds of objection to the evidence which has been received in support of the issue in this cause. It is to be observed that the question arises after verdict, so that it is to be considered whether any defect in the pleadings is not cured by that verdict. To an action on a demand for the Plaintiff's work and labour, the Defendant has pleaded, that the work was done under an agreement between him and the Plaintiff, according to which the Defendant was not to be called on to pay till the work was done to the satisfaction of the Defendant, or to the satisfaction of his surveyor, and then avers that the work was not done to the satisfaction of the Defendant or to the satisfaction of his surveyor; clearly meaning that if the Plaintiff did the work to the satisfaction of the Defendant or his surveyor, that would be a sufficient answer.

The Plaintiff replies, first, that the work was done to

(a) 1 *New Cases*, 323.
(b) 2 *Saund.* 206.

(c) *Hob.* 119.
(d) 3 *New. & M.* 438.

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the satisfaction of both the Defendant and of his surveyor, and then takes a traverse in the very terms of the Defendant's plea, "without this, that the work was not done to the satisfaction of the Defendant, or to the satisfaction of his surveyor;" that is, in effect, saying that it ~~was~~ done to the satisfaction of one or the other, which was the meaning of the parties. I agree that the Defendant might have demurred specially on the ground that the issue tendered was not, as the replication stood, sufficiently certain: instead of that, he joins issue, and it is clear that upon that issue the Plaintiff was bound to shew that the work was done to the satisfaction of the Defendant or of his surveyor. As he succeeded in shewing that, justice has been done between the parties, and after verdict it is too late to object to the supposed ambiguity of the replication. By the 4. Ann. c. 16. 1. it is enacted that "no advantage or exception shall be taken of or for an immaterial traverse."

The cases on this point are numerous, and many of them are collected in *Comyns's Digest Pleader*, D. 22. A Defendant is not to be allowed to join issue, and after taking the chance of a verdict, to take advantage of an ambiguity in the language of a traverse.

PARK J. concurred.

GASELEE J. I have no doubt that the issue tendered by the Plaintiff was in substance the issue authorised by the contract between the parties; the work was to be done to the satisfaction of the Defendant or of his surveyor, and the Plaintiff having proved that it was done to the satisfaction of the Defendant, the Defendant cannot now take advantage of a slip in the pleading, to which, if it left him in any doubt, he ought to have demurred.

VAUGHAN J. concurred.

Rule discharged.

1835.

FINNERTY v. SMITH.

May 2.

IN this case the Court made absolute a rule for setting aside a Judge's order for better particulars of set-off, on the ground that the Plaintiff's attorney's clerk had, without authority, although without any fraudulent intention, altered the date of the jurat of the affidavit on which the Judge's order had been obtained.

Also, upon setting aside an irregular judgment of *non-pros*, they imposed the condition of payment of costs by the Plaintiff's attorney, on the ground that his clerk had, without authority, although without any sinister motive, inserted the word *peremptory* in the Judge's order for an attendance at his chambers on the subject.

The practice of such unauthorised interpolations of the records of the Court was severely censured.

The Court set aside a Judge's order for better particulars of set-off, on the ground that Plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained.

POOLE v. DICAS.

May 4.

IN an action on a bill of exchange drawn by the Defendant, accepted by *Wheeler*, and indorsed by the Defendant to the Plaintiff, a notary's clerk stated at the trial, that when the bill became due on *Saturday*, the 8th of *June* 1833, it was left by the Plaintiff with the notary, to demand payment. A copy of the bill was made in a book kept by the notary for that purpose, and *Manning*, one of his clerks, now dead, went out about seven in the evening to demand payment of the

An entry of the dishonour of a bill of exchange, made in the usual course of business, at the time of the dishonour, in the book of a notary, by his clerk, who presented the

bill, may be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry.

6 Clerk & Fin 583
 7 Pe & H & W 72
 6
 2 L. R. 2 B. 330.
 12 Ch. D. 421

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acceptor; in a short time *Manning* returned, and in the margin of the book containing the copy of the bill, wrote by the side of the copy of the bill, "no effects." This entry was produced at the trial, and proved to be in *Manning's* handwriting.

Another clerk made a similar entry, from *Manning's* dictation, in a separate book which contained the protest for non-payment. All this was done in the regular course of the notary's business. On the *Monday* following a letter was written to the Plaintiff, in *London*, apprising him of the dishonour of the bill, of which the Defendant, also resident in *London*, received notice on *Tuesday* by a letter put into the post on *Monday*.

It was objected that the entry made by *Manning* ought not to have been received in evidence, and that the notice ought to have been given to the Defendant on the *Monday*. A verdict was taken for the Plaintiff with leave for the Defendant to move to set it aside and enter a nonsuit on these grounds.

Humfrey having obtained a rule *nisi* accordingly,

Bompas Serjt. and *Hoggins* who shewed cause, relied on *Doe d. Patteshall v. Turford* (a), where all the cases on the subject are cited, and where it was proved to be the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service; on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of service on the tenant; two of these notices were

(a) 3 Barn. & Adol. 890.

proved to have been delivered by him on that occasion;— and it was held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him was admissible evidence to prove the service of the third notice.

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Kelly and Humfrey contra contended that an entry such as the present "is to be received in two cases only; first, where it is an admission against the interest of a deceased party who makes it; and, secondly, where it is one of a chain or combination of facts, and the proof of one raises a presumption that another has taken place:" Which was the rule acceded to by *Parke J.* in *Doe v. Turford*. Here the entry of the dishonour of the bill was a single unconnected fact, the proof of which did not raise a presumption of any other fact, so that the entry rather resembled that which was made by a sheriff's officer in *Chambers v. Bernasconi (a)*, where the Court of Exchequer intimated an opinion that a written memorandum of an arrest, and of the place where it occurred, made by a sheriff's officer at the time of the caption, and sent by him immediately to the sheriff's office, and there filed in the course of business, was not, after the death of the officer, evidence of the place of arrest in an action between a bankrupt and his assignees. [*Tindal C. J.* What was decided in that case in the Court of Error was, that it was no part of the officer's duty to indorse on the writ the *place* of arrest. The indorsement, therefore, was not entitled to credit as an entry made in the course of business.] Here, the entry was not the best evidence; for the person who gave the answer at the place of presentment might have been called: nor was it clearly proved to have been made at the time of the transaction.

(a) 1 Tyr. 335.

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Then, the letter announcing the dishonour of the bill ought to have been put in the post in time to reach the drawer on the day the bill was dishonoured. In *Smith v. Mullett* (a), where, in an action by the fourth against the first indorsee of a bill of exchange, all the parties to which resided in *London*, it appeared that the Plaintiff received notice of the dishonour of the bill from his indorsee on the 20th of the month, and gave notice to his immediate indorser, by a letter put into the twopenny post-office on the evening of the 21st, but so late that it was not delivered out till the morning of the 22d,—it was held, that by that laches the Plaintiff discharged all the prior indorsers, although in the course of the 22d notice of the dishonour was given both to the second indorsee and to the Defendant.

TINDAL C. J. Upon inspection of the bill, we are satisfied that no question can arise on the last point; for if the bill, after its dishonour on *Saturday* evening, were returned to the holder, in regular course, on *Monday*, notice could scarcely be given to the Defendant till *Tuesday*.

As to the first point, which is of considerable importance, we think the evidence in question was admissible; and we think it admissible on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business by a person who had no interest to misstate what had occurred. If there were any doubt whether it were made at the time of the transaction, the case ought to go down to trial again: but according to my impression of the testimony in the cause, the entry *was* made at the time: had any ambiguity existed on that head, a single question to the witness, on cross-examination, would have cleared it up.

(a) 2 *Campb.* 209.

I give my opinion, therefore, on the assumption that the entry was made at the time. And this does not carry the law farther than the principle established in *Doe d. Patteshall v. Turford*. There, it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service: on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of service on the tenant: two of them were proved to have been delivered by him on that occasion: and it was held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him was admissible evidence to prove the service of the third notice.

In the present case it was the duty of the notary's clerk to present bills for payment on the evening of the day when payment was demandable. After going out with the bill for the purpose of presentment, he returns and makes an entry in the margin of the book in which a copy of the bill had been made upon its being left at the notary's for the purpose of presentment. This was all in the ordinary course of business. The clerk had no interest to make a false entry: if he had any interest, it was rather to make a true entry: it is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred; and a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made, was open to all the clerks in the office, so that an entry if false would be exposed to speedy discovery. The entry being thus *primâ facie* consistent with truth, there are many accompanying circumstances which tend to confirm its correctness; and

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the letter addressed to the holder on *Monday* to apprise him of the presentment and dishonour of the bill is a link in the chain which gives consistency to the whole. It has been argued that the decision in *Doe v. Turford*, can only be supported on the supposition that no other evidence could have been given but that which was received. But that is carrying the case farther than the facts warrant; for there might have been persons present when the notice was served. In the present case, it would operate as a great hardship to require the testimony of the persons who might have been present. The clerk who presented the bill could scarcely, at the distance of two years, point out who it was that answered his application; and if it were necessary to call all the persons who resided at the place of presentment, the expence and inconvenience would be enormous.

The rejection of the evidence which has been received would be a great injury to the commercial classes, by casting an unnecessary difficulty on the holders of bills of exchange.

PARK J. I am of the same opinion. We should occasion great alarm if we were to reverse all the decisions which have been referred to on this point. I go along with the observations of Mr. Justice *James Parke*, in *Doe v. Turford*, where he puts the reception of entries made in the usual course of business, on the ground that the party made the entry at the time. The book here has all the appearance of exactitude; and the whole proceeding was but one act. The clerk goes out; returns; and makes the entry at once: and *Parke J.* says — “It is to be observed, that in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party and his death are enough to authorise its reception; at whatever time it was made it is admissible: but in the other case

it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." It would occasion an enormous expence to call all the persons who might have been at the place when the presentment was made. The decision in *Chambers v. Bernasconi* turned on the circumstance that the sheriff's officer was going beyond the sphere of his duty when he made an entry of the *place* of arrest, and that such an entry therefore had no claim to be received as evidence of that fact. If we were to accede to the argument for the Defendant, we should overrule all the cases on the subject for the last fifty years.

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GASELEE J. I am of the same opinion. If only the entry made by *Manning* had been produced, it would have been more trustworthy evidence than the mere recollection of persons who might have been present; but the entry is one of a chain of circumstances each confirmatory of the other, and therefore the reception of the evidence was correct according to the principle laid down in *Doe v. Turford*.

Rule discharged.

BOSANQUET J. was absent, in his capacity of commissioner of the great seal.

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May 5.

WAITE v. JONES.

Plaintiff declared that he executed a separation deed between himself and his wife, and agreed to pay certain debts due to *G.* and *R.*, and certain household expences at *H.* in full, confiding in an agreement by the Defendant to pay him a certain sum towards the discharge of the said debts and expences, and to enlarge the time mentioned in the deed of separation, for Plaintiff's quitting the house at *H.*, but that the Defendant did not pay the sum agreed on. Plea, that Plaintiff was solely liable to pay the

debts due to *G.* and *R.*, and the household expences in full, the agreement to pay part of which was stated to be the consideration for the Defendant's promise. Held, that the plea was ill, and the declaration sufficient.

THE Plaintiff declared that, on the 19th of *October* 1833, the Defendant signed a certain memorandum in writing, whereby he agreed to and with the Plaintiff, that the time mentioned in a certain deed of separation for the said Plaintiff's quitting a certain house at *Holloway*, should be extended to the 9th of *December* next inclusive; and also to pay the Plaintiff the sum of 160*l.*, by eight half-yearly payments, towards Messrs. *Horne* and *Gates*'s demand of 366*l.* 4*s.* 9*d.*, the said Plaintiff taking the whole of such demand on himself; the payments to be made at the times of the payment of the annuity mentioned in the said deed of separation. And the Defendant also agreed to pay 20*l.* towards liquidating certain outstanding debts at *Rickmansworth*, and also 220*l.* towards certain household expences at *Holloway*, such last-mentioned sum of 220*l.* being divided into two payments, one half thereof being payable at *Michaelmas-day* then next, and the other half at *Lady-day* 1835. And by the said memorandum in writing, it was stated, that the Defendant agreed to the above in consideration of the Plaintiff's executing the deed of separation, and agreeing to pay Messrs. *Horne* and *Gates*, and the household expences and *Rickmansworth* debts, in full. And the Plaintiff averred, that he, confiding in the said agreement of the Defendant, and in consequence thereof, was induced to, and did then execute, the said deed of separation in the said memorandum mentioned, that is to

to Giff. 656.
9. 2. 12. 64. 474.

say, a certain deed of separation between the Plaintiff and one *Mary* his wife, and agreed to pay the said Messrs. *Horne* and *Gates*, in the said memorandum mentioned, their said demand of 366*l.* 4*s.* 9*d.*, and the said household expences and *Rickmansworth* debts in full; and then took upon himself the payment of the said demands, debts, and expences; whereof the Defendant had notice; yet the Defendant did not nor would perform the said agreement, but wholly neglected and refused (although often requested so to do), to make the first payment of the said sum of 220*l.* so agreed to be paid by the Defendant towards the household expences at *Holloway* as aforesaid; which said first payment thereof, amounting to a certain sum of money, to wit, 110*l.* under and by virtue of the said agreement or memorandum in writing, became due and payable, and ought to have been paid by the said Defendant at *Michaelmas-day* last, and the same still remains wholly due and unpaid; and the Plaintiff, by reason thereof, was forced and obliged to pay, and was liable to pay the same out of his own monies, to the damage of the Plaintiff of 120*l.*

Plea. That at the time of the supposed signing by the Defendant, of the supposed memorandum in writing in the declaration mentioned, and before and at the time of the commencing of this suit, the Plaintiff was solely liable to make to the said Messrs. *Horne* and *Gates* the payments, the supposed agreement by the Plaintiff to make which, was by the said supposed memorandum in writing, stated to be in part the consideration for the Defendant agreeing, as was alleged to be in the said supposed memorandum in writing agreed by the Defendant; and that the Plaintiff was, at the said time of the supposed signing by the Defendant, of the said supposed memorandum in writing, and before and at the time of the commencing of this suit, solely liable to pay the said household expences, and *Rickmansworth* debts,

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In full, the supposed agreement by the Plaintiff to pay which household expences, and *Rickmansworth* debts, in full, was, by the said supposed memorandum in writing, stated to be in part the consideration for the Defendant agreeing, as was alleged to be in the said supposed memorandum in writing agreed by the Defendant: and that, the Defendant was ready to verify.

Demurrer and joinder.

R. V. Richards, in support of the demurrer. The plea is ill, and the consideration for the Defendant's promise is sufficient, even though the statement in the plea be true: the agreement by the Plaintiff to execute the separation deed is of itself sufficient. Separation deeds may be either legal or illegal; in the greater number of instances they are legal. See the cases collected in *Roper, Husband and Wife*, from 269 to 293; *Worrall v. Jacob* (a). There is nothing to show the present deed to be illegal, and the Court will not presume illegality. If it be legal, the execution of it is a good consideration for the Defendant's promise; or even if its legality be only doubtful; *Longridge v. Dorville* (b). And the mere trouble of the Plaintiff's attending to execute might be a valid consideration for the Defendant's promise; for the *quantum* of consideration is immaterial; *Starlyn v. Albany* (c), *Pullen v. Stokes* (d), *Trades v. —* (e), *Whitehead v. Greetham* (g). So, if two or three matters constitute an entire consideration, and all fail but one, a sufficient consideration will remain to support a promise. *Best v. Jolly* (h), *Bradburne v. Bradburne* (i). *Vin. Abr. action of assumpsit*, Y. *Com. Dig. action on the case upon assumpsit*, B. 1.

(a) 3 *Mer.* 268.

(b) 5 *B. & Ald.* 117.

(c) *Cro. Eliz.* 67.

(d) 2 *H. Bl.* 312.

(e) 1 *Sid.* 57.

(g) 2 *Bingh.* 464.

(h) 1 *Sid.* 38.

(i) *Cro. Eliz.* 149.

Ellis contra. An engagement made by a husband with a third person to sign a deed of separation from his wife, can form no legal consideration for a promise by the third person to pay money to the husband. It is contrary to the policy of marriage that the husband's assent to such a deed should be purchased by money. In *Hartley v. Rice* (a), it was held that a wagering contract for fifty guineas that the plaintiff would not marry within six years, was *prima facie* in restraint of marriage, and, therefore, void: that principle applies to the present case. The courts have always discountenanced bargains on the subject of marriage: *Woodhouse v. Shipley* (b), *Lowe v. Peers* (c), *Baker v. White* (d), *Hall v. Potter*. (e) And inducements promoting separation after marriage, have been looked on with as much jealousy as bargains before; *Brown v. Peck* (g), *Tennant v. Braie*. (h) In those two cases, bequests made to a wife on condition that she would separate from her husband, were held single.

It is not now disputed that deeds of separation may be legal in themselves, though the courts have conceded this with reluctance, and of late have proceeded entirely on the ground of established precedent; *Durant v. Titley* (i), explained in *Jee v. Thurlow* (k), *Fletcher v. Fletcher* (l), *Westmeath v. Westmeath* (m), *Lord St. John v. Lady St. John* (n): *Lord Rodney v. Chambers* (o), is shaken by the remarks of Lord Eldon in *Lord St. John v. Lady St. John*; and *Guth v. Guth* (p), is disapproved of by Lord Eldon (in the same place), and by Lord Lough-

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(a) 10 *East*, 22.(b) 2 *Atk.* 535.(c) 4 *Burr.* 2225.(d) 2 *Vern.* 215.(e) 3 *Lev.* 411.(g) 1 *Ed. Ca. Ch.* 140.(h) *Toth.* 78.(i) 7 *Price*, 577.(k) 2 *B. & C.* 547.(l) 2 *Cox*, 99.(m) 1 *Dow. N. S. C.* 519.
S. C. in 5 *Bligh, N. R.* 339.
as *Westmeath v. Salisbury*.(n) 11 *Ves.* 582.(o) 2 *East*, 283.(p) 3 *Br. Ch. Ca.* 614.

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borough in *Legard v. Johnson*. (a) Admitting, however, that, for the purpose of the present argument, the deed of separation mentioned in the declaration, is not to be taken as illegal, this is no answer to the objection that the husband's consent to it is not to be bought. It is legal to abstain from marrying; but this abstinence is no consideration for the payment of money; *Hartley v. Rice*. (b) So it is legal to vote for a parliamentary candidate, and it is legal for a majority of part-owners to appoint a commander of a ship; but these acts will not constitute a legal consideration for a promise to pay money; *Allen v. Hearn* (c), *Card v. Hope* (d): and, though the policy of the law be to encourage marriage, yet a bond conditioned that the obligor should marry was held void in *Key v. Bradshaw*. (e) It is true, that a covenant by trustees to indemnify a husband against debts to be incurred by his wife, has been held a good consideration for the husband's agreeing to adhere to the terms of a separation deed. But, in the present case the money is to go into the husband's pocket; the defendant is not a trustee; nor has the payment any reference to the wife's expenses. Besides, the covenant of trustees takes effect only where the separation has actually been effected, and the trustees are parties to the deed; *Stephens v. Olive*. (g) The trustees, in such a case, are mere instruments to carry into effect a transaction previously determined on, and not illegal in itself. The general rule, as laid down in *Worrall v. Jacob* (h), is, that a court of equity will not carry into execution articles of separation between husband and wife, although it will enforce agreements originating in a separation: *Wilkes v. Wilkes* (i) is to the same effect: and it is upon

(a) 3 Ves. 352. 361.

(b) 10 East, 22.

(c) 1 T. R. 56.

(d) 2 B. & Cr. 661.; and

see p. 673.

(e) 2 Vern. 102.

(g) 2 Br. Ch. Ca. 90.

(h) 3 Mer. 268.

(i) 2 Dick. 791.

a principle analogous to this, that a provision for future separation is void; *Hindley v. Marquis of Westmeath*. (a) In *Elworthy v. Bird* (b), the doctrine of enforcing such agreements was carried further; but there the wife had been ill used; the parties were separated in fact, on an understanding that the deed should be executed; and the Vice-Chancellor enforced the execution. But no agreement to separate would be enforced, on the face of which it appeared that the consideration, inducing the husband to consent, was money paid to him by a third person. It is true, that in *Nunn v. Wilsmore* (c), a payment was to be made by a trustee to a husband, for his separate use, after separation; but it was a payment out of the husband's own property, the residue of which was to be applied to defraying the expense of the wife's maintenance; it was a mere exception from the property conveyed by him to the trustee.

If, then, it be illegal that the husband should have his consent purchased, the declaration is ill; for the Plaintiff admits that the consideration of the promise to pay the money was, in part, his execution of the deed; and that he did execute the deed in consequence of the promise. And circumstances which are not expressly averred cannot be implied for the purpose of supporting the legality of the transaction; *Hartley v. Rice* (d), *Lowe v. Peers* (e), and *Holland v. Hall*. (g)

But if it be said that the Court will not intend that the promise to pay the money induced the husband to execute the deed, then the consideration for the promise is so far without effect; and the rest of the consideration, as explained by the plea, is merely an agreement by the Plaintiff to pay his own debts. Such a consideration for a promise is void: *Harris v. Watson* (h),

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(a) 6 B. & Cr. 200.

(b) 2 Sim. & St. 372.

(c) 8 T. R. 522.

(d) 10 East, 22.

(e) 4 Burr. 2225.

(g) 1 B. & Ald. 53.

(h) Peake N. P. C. 72.

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Stilk v. Meyrick (a), *Barber v. Fox* (b), and the notes to this last case. (c) The principles admitted in *Wilkinson v. Byers* (d) are to the same effect, though the consideration was there supported.

Therefore, if the promise to pay operated at all as an inducing motive for the plaintiff to sign the deed, the declaration is ill; if it did not, the plea answers the declaration.

Richards in reply. The whole argument for the Defendant proceeds on the assumption that the Plaintiff had not arranged a separation before the Defendant entered into the agreement in question; whereas it is manifest both from the declaration and the plea, that a separation had been agreed on and the deed actually prepared, before the Defendant entered into his engagement with the Plaintiff.

TINDAL C. J. The objection to the Plaintiff's claim to recover in this cause, arises on the consideration which is alleged to be the ground for the Defendant's entering into the contract which is the subject of the action. That consideration appears to consist of two distinct parts; first, the Plaintiff's executing a deed of separation between himself and his wife; secondly, his agreeing to pay certain demands of *Horne* and *Gates*, and certain household expences at *Rickmansworth*, in full.

It may be conceded that, if either part of the consideration be illegal, the whole falls to the ground; for a party cannot enforce a contract where the consideration is illegal, either in the whole or part: *Featherston v. Hutchinson* (e), is a direct authority on that point. There, a promise by Defendant to pay a sheriff the

(a) 2 *Campb.* 317. S. C. (c) 2 *Wms. Saund.* 137. &
 6 *Exp. N. P. C.* 129. note (b).
 (b) 2 *Saund.* 136. (d) 1 *A. & E.* 106.
 (e) *Cro. Eliz.* 199.

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debt of his prisoner, in consideration of the prisoner's being set at large, and paying the Defendant 2s., was held void as to the whole. If, therefore, the Defendant entered into the agreement upon a consideration in any respect illegal, the Plaintiff cannot support this declaration. It has been urged, that a part of the consideration was, an engagement to pay the Plaintiff a certain sum as an inducement to him to separate from his wife; in other words, an agreement for a future separation. If that were so the transaction would be illegal, and the consequence would follow. But we have no more right to impute an intended illegality than to impute fraud, and I think enough appears to show that this was an innocent act. First, it appears, that the separation deed was prepared though not actually executed; for the Plaintiff alleges, that the Defendant signed a memorandum, whereby he agreed that the time mentioned in a certain deed of separation for the Plaintiff quitting a house at *Holloway* should be extended, and the Plaintiff agreed to pay a sum by instalments, at the time of the payment of the annuity in the deed of separation mentioned; and that he was induced by the Defendant's agreement to execute *the* deed of separation in the memorandum mentioned. The deed, therefore, though not executed, *was* prepared, and did provide for the payment of an annuity. As this is stated to be a deed of separation, and the husband was to pay an annuity, one cannot understand how this should be any other than an annuity for the support of the wife. If so, why may not some third person step forward to secure her that advantage, by agreeing, in consideration of the husband's executing the deed, to take on himself certain payments, which the husband, without such security, might himself be called on to defray. If the agreement had been illegal, the Defendant might have averred the facts which made it so; but as we are not to impute misconduct unless

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it appears, and as all that is stated here is reconcilable with a lawful undertaking, our judgment must be for the Plaintiff.

GASELEE J. I am of the same opinion. When the deed was about to be executed, the husband might think there were debts he ought not to be called on to pay, and if so, there was nothing illegal in a third person undertaking to discharge them for the benefit of the wife. The very object of exonerating the husband from those debts might be to enable him the better to pay the annuity.

VAUGHAN J. Courts of law view separation deeds with more favour than formerly. It is admitted that such deeds may be legal, and there is nothing to show illegality in that which is under discussion. If it had appeared to have been entered on by virtue of an agreement for a future separation, or that the husband was to receive money to induce him to separate, the deed would have been illegal. But it appears rather, that the separation had been already agreed on; and that the Defendant in this action was standing in the capacity of trustee for the wife. If the facts were otherwise, they might have been put on the record.

BOSANQUET J. I agree that if part of the consideration be illegal, that circumstance would taint the whole; and also that an agreement for the husband to separate from his wife for a sum of money would be illegal: but the question is, whether we can collect any thing of that sort from this record. The deed which the Plaintiff was to execute, is called a deed of separation between a husband and his wife. Now there are some deeds of separation which are legal; some which are illegal; illegality is not to be presumed; and unless we neces-

sarily see that a transaction is illegal, we are not to put an unfavourable construction upon it. If we were driven to conjecture, we might infer that there had been an agreement between the Plaintiff and his wife to separate; that a separation deed had been prepared; and that the Defendant was the person to carry it into execution. However, excluding all conjecture, we cannot see on the face of this declaration that the transaction in question was illegal, and therefore there must be

Judgment for the Plaintiff.

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BURTON. v. WIGLEY.

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THE declaration stated, that an action having been brought by *Burton* against *Wigley*, and another by *Wigley* against *Burton*, it was, by a Judge's order made in the two actions by consent of the parties, ordered that the said two causes should be referred to the award of an arbitrator, who was to determine whether a certain agreement in writing, dated the 23d of *August* 1831, and a certain assignment of lease, dated the 5th of *October* 1831, one or both, was or were not entered into and executed by the said parties upon some, and what representations, and whether the same were unfounded; and to award compensation to the party injured thereby, if the arbitrator should think fit; to decide whether the said parties, or either, and which of them, had violated or committed breaches of the said agreement, and in what particular; and to award compensation, if he should think

An arbitrator, who had authority to decide on what terms a partnership agreement should be cancelled, directed, among other things, that the agreement should be cancelled; that one of the partners should have all the debts due to the firm; and should, if necessary, sue

for them in the name of his late partner: Held, that in authorizing one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority.

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fit, for such breach or breaches; to decide the terms upon which the said agreement was to be cancelled; and also which of the said parties had a right to receive bills of costs for business done for the connection of *Wigley* since the 5th of *October* 1831, and whether they, and which of them, had improperly or otherwise received any and what sums, and what sums had been respectively received by the said parties from the said business during that period; and whether there was any thing, and what, due to the said parties respectively in respect thereof, or any other account, after deducting the disbursements and the allowances referred to in the said agreement, if the arbitrator should think fit; in fine, he was to decide upon those and all matters in dispute between the said parties, and to award such damages, or otherwise, as in his discretion he might think fit, taking into consideration the sum paid by *Burton*, as a consideration for the said lease, fixtures, and monies laid out in repairs, and without prejudice to *Burton's* interest in the said lease. That the arbitrator, after hearing the parties, awarded, first, that the said actions in the order mentioned should be discontinued by the Plaintiffs therein; and found, first, that the said agreement in the order of reference mentioned was entered into upon certain representations,—in substance, that the business of an attorney then carried on by *Wigley*, netted an average profit of between 1000*l.* and 1500*l.* a year; that it was a very respectable business; that the house, in which it was carried on, was in a thorough state of repair; that *Wigley* would entirely withdraw himself from practice in *London*, or within seven miles of it; and that he would use his best endeavours effectually to transfer the said business to *Burton*;—next, that the extent and character of the said business, and the state of repair of the said house, had not been truly represented; and that the two last of

the said representations were introduced as stipulations in the agreement, and were not performed by *Wigley*; but the arbitrator awarded to *Burton* no specific compensation for such misrepresentation or breaches, *having taken the same into account on the final settlement therein-after directed between the parties*. That the arbitrator further found, that *Burton* was entitled to receive the bills of costs for all business done for the connection of *Wigley*, from the 5th of *October* 1831 to the 6th of *November* 1832; and that, during that period *Wigley* had improperly received in respect thereof, the sum of 40*l.* 15*s.*, and properly in part payment of certain furniture sold by him to *Burton* the sum of 82*l.* 16*s.* 3*d.*; that *Burton* had received properly during the same period, the sum of 288*l.* 13*s.* 3*d.*; and that there would be due to *Wigley* in respect of the total receipts, after deducting the disbursements and allowances referred to in the said agreement, the sum of 110*l.*: but the arbitrator, by his award, directed that no payment was to be made specifically in respect thereof, *as he had taken the same into account in the final settlement thereinafter directed between the parties*. And, lastly, that the arbitrator having considered, on the one hand, the several claims made by *Wigley*, and, on the other, the claims of *Burton*, by his award directed that the said agreement should be cancelled, and that the several claims of the parties should be settled on the following terms, viz.: that *Burton* should retain the dwelling-house in the agreement mentioned, and certain goods and chattels in the award specified; that all payments and receipts of money on either side, made up to the 6th of *November* aforesaid, should stand good; that *Burton* should be at liberty to collect and retain on his own account all sums of money due for business transacted at the office in *Essex*, from the 5th of

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1835. *October 1831 to the 6th of November aforesaid, and to use the name of Wigley either alone or jointly with his own, if necessary, in suing for the same; that Wigley should, upon the 1st of October, then next ensuing, pay the sum of 100*l.* to Burton as damages; and should also execute a release of all actions, claims and demands whatsoever, except as there excepted: that Burton, upon payment of the said sum of 100*l.*, and execution of the said release, should cancel and deliver up the said agreement of the 23d of August 1831; and that thenceforward Wigley should be at liberty to practise as an attorney and solicitor in London, or in any other place. Also, that Burton should then execute a release of all actions, claims and demands whatsoever, except as there excepted: and that each party should pay his own costs. Of which said award the defendant afterwards, to wit, on, &c., had notice. That on the 7th of November 1834, it was duly ordered that the said judge's order should be made a rule of court. But that Wigley did not nor would on the said 1st of October next after the making and publishing of the award, and after he had notice thereof as aforesaid, or at any time before or since, although duly requested, pay or cause to be paid to the Plaintiff the said sum of 100*l.* or any part thereof.*

Demurrer and joinder.

Miller, in support of the demurrer, contended that the arbitrator had exceeded his authority in awarding that the Plaintiff should use the name of the Defendant, either alone or jointly with his own, in suing for the bills of costs mentioned in the award. If the award were supported in that respect, the Defendant might eventually be liable for the costs of actions in which he had no interest: the rule of court conferred no authority on the

arbitrator to subject the Defendant to the costs of such actions, and in that respect the award was not final. At all events, the arbitrator should have provided for the Defendant an indemnity against the risk of those costs.

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TINDAL C. J. The question before us is, whether or not the arbitrator in ordering actions to be brought in the name of the Defendant has exceeded his authority; for if he has, the award may be considered void. But looking at the order of *ni si prius* and the award, we are of opinion that he has not exceeded his authority in the matter now contested. By the order it appears he was to decide "whether a certain agreement in writing, dated the 23d of August 1831, and a certain assignment of lease, dated the 5th of October 1831, one or both, were or were not entered into and executed by the parties, upon some and what representations, and whether the same were unfounded; to award compensation to the party injured thereby, if he should think fit; to decide whether the parties, or either and which of them, had violated or committed breaches of the said agreement, and in what particular; to award compensation, if he should think fit, for such breach or breaches; to decide the terms upon which the said agreement should be cancelled; and also to decide which of the said parties had a right to receive bills of costs for business done for the connection of *Wigley* since the 5th of October 1831." If he was to decide which of the parties had a right to receive the bills of costs, I should have thought it impliedly within the scope of his authority to order suits for the purpose of recovering those costs. But it does not rest there, for the power by which he is authorised to settle the terms on which the agreement between the parties should be cancelled includes this power of directing actions to be brought. It is said that

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the effect of this may be to expose the Defendant to costs, and that that the award, to that extent, is not final between the parties. But such contingent liability to costs forms no part of the disputes which the arbitrator was called on to settle, in respect of which the award is clearly final; it is only something which may arise out of the award; a possibility of new disputes, from which no award can ever exempt the parties concerned. It is urged that the arbitrator might have provided the Defendant some kind of security against the liability to these costs; but that again might have given rise to future disputes, and seems not to be required by the circumstances of the case. *Philips v. Knightley (a)*, nearly resembles the present case.

VAUGHAN J. and GASELEE J. concurred.

BOSANQUET J. The arbitrator finds that the agreement was entered into by *Burton* upon a misrepresentation, but he awards *Burton* "no specific compensation for such misrepresentation or breaches, having taken the same into account on the final settlement thereafter directed between the parties." In the final settlement he orders actions to be brought; that may subject *Wigley* to liabilities, but the arbitrator has considered that in the final account.

Judgment for Plaintiff.

(a) 2 Str. 903.

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ALEXANDER and Another v. GARDNER and Another.

May 6.

ASSUMPSIT for goods bargained and sold, under the following circumstances :—

The Plaintiffs, merchants in *London*, and agents for *Irish* houses in the sale of butter, being in expectation of a cargo from *Murphy* of *Sligo*, entered, by means of their broker, into the following contract with the Defendants :—

“ *London*, October 11. 1833.

“Sold to Messrs. *William Gardner* and son for account of Messrs. *Alexander* and Co., 200 firkins *Murphy* and Cos. *Sligo* butter, at 71s. 6d. per cwt. free on board for first quality ; 4s., and 6s. difference for inferiors. Payment, bill at two months from the date of landing. To be shipped this month. An average for weights and tares within six days of landing, if required.”

On the 11th of *November*, the Plaintiffs received from *Murphy* the invoice and bill of lading of these butters, and also the intelligence that, owing to there having been no ship in the port of *Sligo* bound for *London*, the butter had not been shipped till the 6th of *November*.

This circumstance was immediately communicated to the Defendants, who at first refused to abide by the contract, on the ground that the butters were to have been shipped in *October*. In a little time, however, they abandoned their objection, and consented to retain the invoice and bill of lading which had been delivered to them on the 12th of *November*.

The invoice, which described the butters in detail as

Plaintiffs in *London*, sold to Defendants a quantity of butter, which they expected from *Sligo* ; the quality and price were specified in the contract. The butter was to be shipped for *London* in *October*, and to be paid for by bill at two months from the date of landing. The butter was not shipped till *November*, but the Defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck, Held, that Plaintiffs might recover the price from Defendants

ants in an action for goods bargained and sold.

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to weight, number of casks, &c., was addressed to the Plaintiffs; but upon handing it over, their name had been struck out, and the name of the Defendants substituted, as is usual in the trade.

The bill of lading described the casks by their marks and several quantities, and directed them to be delivered to the Plaintiffs.

In *December* 1833, the greatest part of the butters was lost by shipwreck on the coast of *Galway*, and a small part of them arrived in a damaged state: whereupon the Defendants, not having effected any insurance, refused to pay.

At the trial before *Tindal C. J.*, it was contended on their part that, under the circumstances above stated, the action for goods bargained and sold did not lie; and that the Plaintiffs, in order to recover, should have declared specially on the contract of the 11th of *October*, alleging and proving that the goods had been shipped in *October*, and duly landed; since, according to the contract, payment was not to be made till two months after landing.

The jury found that the condition for shipping in *October* had been waived by the Defendants, and returned a verdict for 414*l.*, the contract price of the butters.

Talfourd Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* for setting aside this verdict and entering a nonsuit on the ground above stated. He relied mainly on *Simmons v. Swift (a)*, where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him: it was held, that the property in the residue did not vest in the purchaser

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until it had been weighed, that being necessary in order to ascertain the amount to be paid: and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. From that case it followed that an action for goods bargained and sold will not lie, unless the property in the goods passes to the purchaser at the time of the bargain. But so far was the property here from passing to the Defendants at the time of the bargain, that at that time the goods were not in the Plaintiffs' hands, or, for aught that appeared, in existence. And the principle established by *Goss v. Lord Nugent* (a), that when the time for delivery is fixed by a written contract, it cannot be extended by oral agreement, afforded a strong argument to shew that the Plaintiffs should have set out in their declaration the special circumstances of their demand.

Bompas Serjt. and *Martin* shewed cause. The action for goods bargained and sold will lie; for the property in the butters passed to the Defendants by the contract. It was not necessary to that end, that they should have been in the actual possession of the Plaintiffs. The invoice and bill of lading were symbols of possession, and by the transfer of those symbols the property passed to the Defendants; *Lickbarrow v. Mason* (b), *Haille v. Smith* (c), *Cuming v. Brown* (d), *Barrow v. Coles*. (e) The Plaintiffs had no longer an insurable interest; *Hibbert v. Carter*. (g) In *Simmons v. Swift* the bargain was held incomplete, because something remained to be done on the part of the vendor, namely, the weighing a part of the bark; but here, at the time of the contract the quantity, quality, weight, and price of the butters, were all ascertained by

(a) 5 B. & Adol. 58.

(d) 9 East, 506.

(b) 2 T. R. 63.

(e) 3 Campb. 92.

(c) 1 B. & P. 563.

(g) 1 T. R. 745.

1835. the contract itself. *Rhode v. Thwaites* (a), *Atkinson v. Bell* (b), and *Elliott v. Pybus* (c), are strong authorities for the Plaintiffs. The condition for shipping in *October* was expressly waived by the Defendants; there was no agreement for extending the time; and therefore, *Goss v. Lord Nugent* has no application. Even if the contract here were conditional, the condition having been waived, it was not necessary to declare specially. 2 *Wms. Saund.* 269 b. note. As to the objection that the goods were to be paid for in two months after landing, that was a stipulation ascertaining only the time of payment, and not rendering the landing a condition precedent. In *Fragano v. Long* (d), where the vendee, resident at *Naples*, sent an order to the vendors at *Birmingham*, "to despatch to him certain goods, on insurance being effected; terms, three months' credit from the time of arrival;" the vendors (having marked the package with the vendee's initials), despatched the goods by the canal to *Liverpool*, and effected an insurance declaring the interest to be in the vendee. At *Liverpool* the goods were delivered by the agent of the vendors to the owner of a vessel bound to *Naples*, through whose negligence they were damaged: it was held, that the property of the goods vested in the vendee as soon as they were despatched from *Birmingham*; that the terms of the order did not make the arrival of the goods at *Naples* a condition precedent to his liability to pay for them; and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship owner.

Talfourd and *Kelly* in support of the rule.

Looking to this transaction, it was not a contract for the bargain and sale of goods at the time of the con-

(a) 6 B. & C. 388.

(b) 8 B. C. 277.

(c) 10 Bingh. 512.

(d) 4 B. & C. 219.

tract, and did not become so by any subsequent circumstances. For,

First, the Plaintiffs did not make out their case by shewing simply, the indorsement of the bill of lading: they were obliged to connect it with, and to produce the special contract:

Secondly, the goods were not in their possession even when the bill of lading was transferred: and,

Lastly, the landing of the goods was a condition precedent to their being paid for; and as the contract was in writing, the condition for shipping in *October* could not be waived orally.

In none of the cases cited were there any special provisions in the contract, with reference to which the rights of the parties were to be decided; and in all of them the goods sold were in the possession of the vendors: but here the Plaintiffs, not being in possession of the goods, were not in a situation to carry the contract absolutely into effect.

If *Fragano v. Long* had been an action for goods bargained and sold, it would have afforded an answer to the objection made in this case, that the landing of the goods was a condition precedent to the property vesting in the Defendants: but it was an action by the purchaser of goods against a ship owner for negligence in conveying them; and the purchaser having actually insured the goods, was the party at whose risk they were carried. Here the Defendants had not insured, and for the reasons before urged, were not the responsible proprietors.

TINDAL C. J. The question in this cause is, whether an action for goods bargained and sold is maintainable against the Defendants. They contend, that such an action does not lie against them; but, that under the circumstances of the case, the Plaintiffs should have declared specially.

The original contract was made on the 11th of

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October 1833, in which contract it is stated, that the Plaintiffs sold to the Defendants 200 firkins of Sligo butter, free on board, at 71s. 6d. per cwt.: that the goods were to be shipped in the course of that month, and that payment was to be by a bill of exchange, payable two months after the landing of the goods.

Upon this contract three objections have been raised to the action for goods bargained and sold.

First, that the butters were not in the possession of the Plaintiffs at the time of the contract.

Secondly, that they were not shipped in *October* as the contract required; and,

Thirdly, that as the payment was to be at two months after the landing of the goods, and as the goods were never landed, such payment could not be required.

Notwithstanding these objections, I think the contract was to pay for goods bargained and sold, and that the declaration to that effect is in the proper form. And I agree that the Plaintiffs must show that the property in the goods passed to the Defendants by the contract; for, unless it did, the goods were not bargained and sold to them.

But as to the first objection, if the goods were ascertained and accepted before the action was brought, it is no objection that they were not in the possession of the plaintiffs at the time of the contract. In *Rhode v. Thwaites* (a), the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads: four hogsheads were delivered; the vendor filled up, and appropriated to the vendee sixteen other hogsheads; informed him that they were ready, and desired him to take them away; the vendee said he would take them as soon as he could: and it was held, that the appropriation having been made by the vendor and assented to by the vendee, the sixteen hogsheads thereby

passed to the latter; and that their value might be recovered by the vendor under a count for goods bargained and sold.

Here, it is impossible to say the goods were not ascertained and accepted before the action was brought; for the quantity, quality, and price, were all specified in the invoice; and the bill of lading was regularly indorsed to and accepted by the Defendants.

But then it is said, that the shipping of the goods in *October* was a condition precedent to any claim on the Defendants. If the Defendants had in the first instance repudiated the bargain on that ground, it is true no action would have lain against them. But it is found by the jury that they waived the objection; and this being only a parol contract, if the party waives the condition he is in the same situation as if it had never existed.

The third objection to the Plaintiffs' recovery is, that the butters were to be paid for by a bill at two months after landing. But the object of that stipulation was, merely to fix the time of payment, and not to make the landing a condition precedent. For that point it is enough to refer to the decision in *Fragano v. Long*.

The present case, therefore, is brought within the result of all the decisions, as stated by Serjt. *Williams*, in the note 2 *Wms. Saund.* 269 b.

Here, the action was not brought till long after the two months which would have succeeded the landing of the goods, if they had arrived in the ordinary course. The Plaintiffs, therefore, being in the situation of one who has parted with his goods, and the Defendants of one who has received them upon an engagement to pay, the action will lie, and this rule must be discharged.

PARK J. I entirely concur. The condition for shipping the goods in *October* having been waived, the question is, whether an action lies for goods bargained

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and sold; and that turns on the question, whether or not there has been an acceptance of the goods by the Defendants. I think there has, and that an action might have been maintained even for goods sold and delivered; but it is sufficient to say, that the right to sue for goods bargained and sold is complete. The Defendants' argument turns on the principle, that goods sold remain at the risk of the vendor, till every thing is done to complete the contract: *Hinde v. Whitehouse* (a); or till a specific appropriation has taken place. But that having been effected here by the transfer of the bill of lading, the case falls within the principle of *Rhode v. Thwaites*, and *Fragano v. Long*. We have been pressed with the authority of *Simmons v. Swift*. There, the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified; and a part was afterwards weighed and delivered to him: it was held that the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it had been vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. In that I entirely concur. But see what the case was in *Rhode v. Thwaites*. There the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads: four hogsheads were delivered to the vendee; the vendor filled up and appropriated to the vendee sixteen other hogsheads, informed him that they were ready, and desired him to take them away. The vendee said he would take them as soon as he could. It was held, that the appropriation having been made and assented to, the property in the sixteen hogsheads passed to the vendee, and that

(a) 7 East, 558.

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their value might be recovered by the vendor under a count for goods bargained and sold. And the argument that the arrival and landing of the goods was to be a condition precedent to payment, is answered by *Fragano v. Long*. There the vendee, resident at *Naples*, sent an order to the vendors, hardwaremen at *Birmingham*, "to despatch to him certain goods, on insurance being effected; terms, three months' credit from the time of arrival." The vendors despatched the goods by the canal to *Liverpool*, and effected an insurance, declaring the interest to be in the vendee: at *Liverpool* the goods were delivered by the agent of the vendors to the owner of a vessel bound to *Naples*, through whose negligence they were much damaged: it was held, that the property in the goods vested in the vendee as soon as they were despatched from *Birmingham*; that the terms of the order did not make the arrival of the goods at *Naples* a condition precedent to a liability to pay for them; and that the vendee might therefore maintain an action for the injury done to the goods through the negligence of the ship owner.

That case, therefore, and the case of *Rhode v. Thwaites*, entirely warrant our present decision.

GASELEE J. The Chief Justice and my rother *Park* having gone so fully into the case, I shall only observe that here the invoice specifies the weight and price of all the goods.

BOSANQUET J. I think that this was a contract executed, and that therefore the Plaintiff has properly declared for goods bargained and sold. It is not necessary for the support of such an action that the goods should be actually in the possession of the vendor. Here he was entitled to the possession, and has done all that was required on his part to render the transfer

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effectual. It is said he should have declared specially, shewing the performance of the condition precedent as to the time of shipping, or a waiver of it in writing. If the contract containing the condition had been by deed, that doctrine might have applied, but this was a parol contract, and the condition might be waived without a writing. A contract must be declared on according to its legal effect; and the effect of all the circumstances here is, to render it a contract without a condition. The objection that the arrival of the goods was a condition precedent to payment is answered by the case of *Fragano v. Long*, where it was decided that the property in the goods vested in the vendee as soon as they were despatched from *Birmingham*; that the terms of the order did not make the arrival of the goods at *Naples* a condition precedent to the vendee's liability to pay for them; and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship owner. Here, the time for arrival of the goods having long since elapsed, the time for payment must also be arrived if there was to be any payment at all, and that there was to be a payment is decided by *Fragano v. Long*.

Rule discharged.

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FANCOURT v. BULL.

May 6.

THE declaration stated that the Plaintiff was lawfully possessed as of his own property of a certain bill of exchange in writing, — made and drawn by one *Hugh Fraser* upon and accepted by the Plaintiff, bearing date the 20th of *November* 1853, whereby the said *Hugh Fraser* requested Plaintiff to pay to the order of said *Hugh Fraser* 350*l.* three months after the date thereof, — of the value of 350*l.* of lawful money, &c., and being so possessed thereof, the Plaintiff, afterwards, to wit, on, &c., casually lost the said bill of exchange out of his possession; and the same afterwards, to wit, on, &c., came to the possession of the Defendant by finding; yet the Defendant, well knowing the said bill of exchange to be the property of the Plaintiff, and of right to appertain and belong to him, would not deliver the said bill of exchange to the Plaintiff, although requested so to do; but converted and disposed of the said bill of exchange to his, the Defendant's use, to the damage of the Plaintiff of 500*l.*, &c.

Pleas. First, general issue. Secondly, that the said bill of exchange in the declaration mentioned, before and at the time of the delivery thereof to the Defendant as next therein-after mentioned, was in the possession of *Hugh Fraser*, who was the drawer thereof and the person to whose order the same was made payable; and that the same had been and then was good consideration indorsed it to Defendant: Plaintiff replied, that there was no good consideration for *P.*'s indorsing the bill.

The jury having found for the Plaintiff on this replication, the Court refused to arrest judgment or award a replender.

1. A party who, being employed by Plaintiff to procure a bill of exchange to be discounted, lodged it instead with Defendant as a security for a debt due to Defendant, was held a competent witness for Plaintiff in an action of trover brought by Plaintiff for the recovery of the bill.

2. To trover for a bill of exchange, Defendant pleaded that the drawer being lawfully possessed of the bill, indorsed it to *P.*, and that *P.* for

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indorsed by the said *Hugh Fraser*, and also by one *Frederick Palmer*. That before and at the time of such delivery of the said bill of exchange to the Defendant as aforesaid, one *Samuel Salmonson* and the said *Hugh Fraser* were justly and truly indebted to the Defendant in a certain large sum of money, to wit, the sum of 300*l.* for money before then received by the said *Samuel Salmonson* and *Hugh Fraser*, to and for the use of the Defendant; and thereupon and long before the said bill of exchange had become due and payable according to the tenor and effect thereof, to wit, on the 10th of *December* 1833, and whilst the said *Samuel Salmonson* and *Hugh Fraser* continued and were so indebted to the Defendant as aforesaid, the said *Hugh Fraser* in consideration thereof, and also in consideration of a certain further sum of money, to wit, the sum of 60*l.*, then lent and advanced by the Defendant to the said *Hugh Fraser* at his request, then delivered the said bill of exchange so indorsed as aforesaid, to the Defendant, for the purpose of securing to the Defendant the repayment of the said several sums of money: by means of which said premises the Defendant then became and was the lawful holder of the said bill of exchange, and continued such holder thereof until and at the time of the said supposed conversion thereof in the declaration mentioned: and that, the Defendant was ready to verify, &c.

Thirdly, that before the time of the said supposed conversion of the said bill of exchange in the declaration mentioned, the said *Hugh Fraser*, who was the drawer thereof, and the person to whose order the same was made payable, was lawfully possessed of the same; and being so possessed thereof, the said *Hugh Fraser* indorsed the said bill of exchange to the said *Frederick Palmer*; and the said *Frederick Palmer*, before the said bill of exchange had become or was due and

payable according to the tenor and effect thereof, to wit, on &c., for a good and valuable consideration in that behalf, indorsed the same to the Defendant, by means whereof the Defendant then became and was the lawful holder of the said bill of exchange, and continued such holder thereof until and at the time of the said supposed conversion thereof in the declaration mentioned: and that, the Defendant was ready to verify, &c.

The Plaintiff joined issue on the first plea, and to the second replied, that the said *Hugh Fraser* received the said bill of exchange in the declaration mentioned, and until the Defendant came possessed thereof held the same for a special purpose, for the sole use and benefit of the Plaintiff and not otherwise, to wit, for the purpose and in order that the said *Hugh Fraser* might get the said bill of exchange discounted for the Plaintiff, and deliver and pay the proceeds thereof upon such discounting to the Plaintiff: of all which premises the Defendant at the time he received the said bill of exchange had notice: That the said *Hugh Fraser* in violation of good faith and contrary to the purpose for which he received the said bill of exchange deposited the same with the Defendant as in the second plea was alleged; and the Defendant took and received the said bill of exchange well knowing and with notice of all the said premises, and that the Plaintiff had not received any value for the said bill of exchange: and that, the Plaintiff was ready to verify, &c. And as to the plea of the Defendant lastly above pleaded, the Plaintiff said, that there never was a good or valuable consideration for the said *Frederick Palmer's* indorsing the said bill of exchange to the Defendant in manner and form as the Defendant had in his said last plea alleged, &c.

Rejoinder, that the Defendant had not at the time he received the said bill of exchange in the declaration mentioned, any knowledge or notice that the said *Hugh*

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Fraser had received or held the said bill of exchange for the special purpose in the replication mentioned for the use and benefit of the Plaintiff; or that the said *Hugh Fraser* had deposited the same with him the Defendant contrary to the purpose for which the said *Hugh Fraser* received the same; or that the Plaintiff had not received any value for the said bill of exchange: and of that, the Defendant put himself upon the country, &c.

The Defendant joined issue on the replication to the third plea; and the plaintiff, on the rejoinder.

At the trial, *Fraser*, being called as a witness for the Plaintiff, was objected to as having an immediate interest in the result of the action:

But the objection being overruled, — (without reference to the statute 3 & 4 W. 4. c. 42.), on the ground that whichever way the verdict went, he would be liable to one or other of the parties, and so, stood indifferent between them, — he stated,

That the bill had been entrusted to him to raise money for the Plaintiff; that he applied to the Defendant to discount it for the Plaintiff, which the Defendant agreed to do, if *Fraser* would allow a debt due from *Salmonson* and *Fraser* to the Defendant, to be secured by *Fraser's* receiving the amount of the bill *minus* that debt; this, after some shew of reluctance, was assented to by *Fraser*, who thereupon obtained 60*l.* on the bill; but when at a subsequent period he came and paid 60*l.* to redeem the bill, the Defendant insisted upon retaining it as a security for the debt due to him from *Salmonson* and *Fraser*.

The witness also proved that *Palmer* received no consideration for his indorsement.

Upon this evidence a verdict was found for the Plaintiff; but a rule *nisi* was afterwards obtained to set it aside on the ground that *Fraser* was an incompetent witness, — or to arrest the judgment or award a repleader, on the

ground that admitting the allegations in the replication to the third plea to have been established in proof, there was nothing in them to shake the title to the bill set up by the Defendant in that plea, the issue raised by the replication being immaterial; so that upon the third plea the Defendant was entitled to judgment.

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Stephen Serjt. and *Martin* shewed cause. The witness, being equally liable whichever way the verdict went, stood indifferent between the parties, and so was properly admitted; *Carter v. Pearce.* (a) Then, with respect to arrest of judgment, the Defendant's colourable title, as disclosed on the third plea, having been answered by the verdict on the replication, the Plaintiff's title stands unimpeached as alleged in the declaration; and, upon the whole record, he is entitled to judgment: *Vin. Abr. Color. G.*

Nor was the issue on the third plea immaterial; for, after the averment in the declaration, that the Plaintiff had lost the bill, the third plea had been ill without an averment that the bill came to Defendant on good consideration. The Plaintiff having lost the bill, and not having transferred it in the ordinary course of business, the substantial question was, whether the Defendant had lawfully acquired a property in it, which, under such circumstances, he could not do without giving consideration for it. He was in the same situation as a trespasser who holds a chattel; but who cannot retain it even against one who has a mere special property in it; *Wilbraham v. Snow.* (b) And a traverse ought to be of the most material thing, and the effect of the bar: thus in trespass, if the defendant pleads that *A.* being seised made a lease to him, the plaintiff shews that after disseisin of *A.* his father was seised, and died seised, and

(a) 1 T. R. 163.

(b) 3 Saund. 47.

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the land descended to himself, he must traverse the lease; *Com. Dig. Pleader*, G. 10. But if the issue be immaterial, the defendant, as having raised it, cannot take the objection; *Symmers v. Regem.* (a) At all events, it would only go to a repleader, which the Court will not award in favour of a party, who, upon the whole proceeding, appears to be substantially in the wrong; *Goodburne v. Bowman.* (b)

Kelly and *Swann* in support of the rule. The witness did not stand indifferent between the parties; for if the Plaintiff succeeded, the witness would only be liable to the Defendant in the amount of the bill, *minus* the 60*l.* he had repaid to the Defendant; whereas, if the Defendant had indorsed the bill over for value, and then succeeded in this action, the Plaintiff would be liable to the indorsee in the full amount of the bill; and *Fraser*, consequently, would be liable over to the Plaintiff to the same amount, as well as to the costs of this action.

Again, supposing *Fraser* were called on to pay the Defendant the amount of his lien on the bill, he would be assisted in that payment by *Salmonson*, since the bill was deposited with the Defendant for a debt due to him from *Fraser* and *Salmonson*. But if *Fraser* were called on to pay the amount of the bill to the Plaintiff, he must bear the whole burthen himself.

Then, the allegation in the third plea, that *Palmer* indorsed the bill for a good consideration, was immaterial; for it is alleged that *Fraser* being lawfully in possession, indorsed it. No consideration is necessary to the validity of an indorsement by one lawfully in possession; and the holder might have declared on that indorsement, omitting any mention of the intermediate indorsement by *Palmer*. Notwithstanding the finding

(a) *Cowp.* 501.

(b) 9 *Bingh.* 532.

of the jury on the replication to that plea, sufficient remains on the plea to establish the Defendant's title to the bill, and to the judgment of the Court.

The judgment for the Plaintiff, therefore, on that replication, ought to be arrested. For whichever party appears upon the whole of the record to have the better title, will obtain the decision of the Court; *Wilkinson v. Malin.* (a)

Cur. adv. vult.

TINDAL C. J. The Defendant in this case obtained a rule to shew cause, why the verdict should not be set aside, on the ground of the improper admission of evidence, or why the judgment for the Plaintiff should not be arrested, or a repleader awarded.

Upon the first ground of objection, we see no interest which *Fraser* has in the event of this suit, so as to render him an incompetent witness for the Plaintiff. The Defendant claims to retain this bill as a security for the debt of *Fraser*, for which he alleges it was pledged to him. If the Plaintiff succeeds in this action, *Fraser's* debt will immediately revive, and the Defendant may recover it in an action against him. If, on the other hand, the Plaintiff fails in the action, he will be able to recover against the witness the amount of the damage he has sustained by the wrongful delivery of the bill; that is, the amount of the lien which the Defendant has obtained upon the bill: and as to the argument that the witness might be liable to the Plaintiff in a larger amount than to the Defendant, if the bill had been indorsed over by the Defendant to a third party for value, the answer is, that such is not the case between these parties; for in order to give such indorsee a better title than the Defendant, it must be shewn that

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(a) 2 Cr. & Jer. 636.

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it was indorsed over for value, and without notice of the defect of the Defendant's title; but there is no such evidence in the case. The witness appears, therefore, to stand indifferent between the parties as to any claim on the bill itself; and as to the costs of this action, in case the Plaintiff fails, there seems no principle upon which the witness can be held liable to such costs. If the Plaintiff has brought an action of trover for his bill, which he is unable to support, either on account of any legal objection, or for want of sufficient evidence, he must himself bear the costs of such unfounded action; he can never state them in a declaration against the witness, as a necessary consequence of the act of the witness, in wrongfully delivering the bill to the Defendant.

The application by the Defendant to arrest the judgment, involves a question attended with greater nicety and difficulty. This application proceeds on the ground that, notwithstanding the jury have found for the Plaintiff, upon the traverse of the single fact taken by him in his replication to the third plea, still sufficient remains upon that plea unanswered, and admitted by the replication, to form a legal bar to the Plaintiff's demand. If such be the real state of the pleadings, the inference is undoubtedly correct that the Plaintiff cannot be entitled to the judgment of the Court. But looking to the nature of the Plaintiff's claim, as stated in his declaration, and to the answer set up by the Defendant in his third plea, we think the allegations in his third plea, which remain admitted by the replication, do not constitute a legal answer to the action.

This is an action of trover, in which the declaration states the Plaintiff to be possessed of the bill of exchange as of his own property, and that the Defendant wrongfully converted it to his own use. The third plea purports to be a plea of property in the bill in the Defendant; a defence which, according to the new rules

of pleading, must be pleaded specially to the action. This plea, therefore, in order to be a valid plea, must confess and avoid the Plaintiff's right of action. It does, consequently, admit the property of the bill to have been in the Plaintiff, and that the Defendant converted the bill to his own use; but it proceeds to introduce and allege new facts, which, as the Defendant contends, shew the property to have been in the Defendant, or, at all events, out of the Plaintiff, at the time of the conversion of the bill. Those facts (omitting the allegation which has been negatived by the jury, and which, therefore, may be considered as if never inserted in the plea), are the three following; viz., first, that before the conversion by the Defendant, *Fraser*, who was the drawer and the person to whose order the bill was made payable, was lawfully possessed of the bill. Secondly, that being so possessed thereof, he indorsed the bill to *Palmer*; and, thirdly, that *Palmer*, before the bill became payable, indorsed the same to the Defendant. The question, therefore, on the pleading, is reduced to this, whether these facts amount to an avoidance of the Plaintiff's right of action, by shewing the property in the bill to be out of the Plaintiff.

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That the special plea admits, not merely the right of possession, but the *property* of the bill to have been in the Plaintiff, is clear from the decision of the Court in the case of *Comyns v. Boyer* (a), in which the defendant pleaded in bar to an action of *trover* for nine oxen, that one *William White* was possessed of these nine oxen and sold them to the defendant in market overt, whereby he became possessed of them and converted them. Upon demurrer, one objection taken by the plaintiff was, that the plea did not confess nor deny the property, nor answer thereto. But the Court held "that the plea

(a) *Cro. Elis.* 485.

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was good enough as to that; for when he justifies by buying in a market overt, it is thereby allowed that the property was in the plaintiff, but he is bound by that sale; and he needed not otherwise confess it." The Plaintiff, therefore, being admitted by the plea to be the lawful owner of this bill, and to have the property in it, is it enough to deprive him of that property to allege in the plea that *Fraser* became lawfully possessed of it, and indorsed it over to *Palmer*, and *Palmer* to the Defendant, without alleging either that *Palmer* or the Defendant took the bill for a valuable consideration? and we are of opinion that it is not. All the facts alleged in the plea may be perfectly true, and yet the property in the bill remain unaltered in the Plaintiff; for these allegations are consistent with the loss of the bill by the Plaintiff, and the finding thereof by *Fraser*; or with the delivery of the bill to *Fraser* for some special purpose; in either of which cases *Fraser* would have been lawfully possessed of the bill; but in neither of those cases could he have given any title to the bill to a third person as against the Plaintiff, simply by indorsing it over: in order to give such title the indorsee must have given value for the bill, and have taken it *bonâ fide*, and without notice of the defect of *Fraser's* title. It is argued, that in a declaration upon a bill of exchange, it is sufficient to state an indorsement, without any allegation that it was made upon a good consideration; the bare allegation of the indorsement importing that it was made for value. This is undoubtedly the case, where the holder is enforcing his remedy on the bill which has been in a due course of circulation; but here the action is brought to recover the property in the bill, not to enforce its payment. The Plaintiff alleges his title, and challenges the Defendant to disprove it, or to produce a better; and it is manifest on the face of the declaration that this bill

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was not in a course of circulation; for the Plaintiff alleges that he was the owner of a bill drawn by *Fraser* upon himself, and accepted by himself the Plaintiff; whereas a bill accepted by the Plaintiff in the ordinary course of business, would not have been the property of the acceptor, but of the drawer or some indorsee. To divest such a title, therefore, out of the Plaintiff, we think something more was necessary than a mere indorsement of the bill. In the case before cited of *Comyns v. Boyer*, a possession by a stranger, and sale in market overt, was held a sufficient allegation in the plea to divest the property of the Plaintiff; because a sale in market overt is a title against all the world. But here, a lawful possession and indorsement, unless it was an indorsement for value, and without notice of the defect of *Fraser's* title, would not give a good title against all the world; it would give the indorsee no better title than *Fraser* had himself; that is, a title of possession only, leaving the property in the Plaintiff.

For these reasons, we think there is no ground for arresting judgment for the Plaintiff; and as to the award of a repleader, it is manifest that the Plaintiff has taken his issue upon the only material fact alleged in the third plea, which traverse has been found for him. The Defendant, therefore, can have no right to demand a repleader, when it appears that his own plea is so defective, that even when unanswered, it forms no bar to the Plaintiff's declaration.

Judgment for the Plaintiff.

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May 7.

DEFRIES v. DAVIS.

The Court has no jurisdiction to discharge from custody an infant in execution for damages in an action of slander.

TALFOURD Serjt. obtained a rule calling on the Plaintiff to shew cause why the Defendant, an infant 17 years old, should not be discharged out of the custody of the warden of the *Fleet* at the Plaintiff's suit in this action.

The Defendant had been taken in execution in *February* last at the suit of the Plaintiff for 40*l.* damages, and 70*l.* 5*s.* costs, recovered in an action of slander, in which the Plaintiff alleged and proved special damage.

The Defendant petitioned for his discharge in the Insolvent Debtors' Court, but was opposed by the Plaintiff, and remanded, on the ground that being an infant he could not execute the warrant of attorney which is the condition of an insolvent's discharge.

Hoggins, who shewed cause against the rule, contended that the Court had no authority to interfere, the Insolvent Debtors' Court having an especial jurisdiction to relieve Defendants in slander causes, and at the same time to award punishment for the slander. 7 *G. 4. c. 57. s. 4.*

Talfourd. The Insolvent Debtors' Court having been precluded from giving relief by the Plaintiff's opposition, and so young a person being exposed to an imprisonment of four years for a juvenile indiscretion, the Court will interpose to mitigate such a punishment. In *Ex parte Deacon* (a) it was held, that though a married woman, who, with her husband, was in execution for a debt contracted by her before coverture, could not be

(a) 5 *B. & Ald.* 759.

discharged by the Insolvent Debtors' Court, she not being capable of executing a warrant of attorney and complying with the other terms required by the 1 G. 4. c. 119. s. 25., yet, she might be discharged by the court in which the action was brought.

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TINDAL C. J. We should be happy to interfere if it could be shewn that we have any jurisdiction; but this case must be decided as if there were no Insolvent Debtors' Court; and we must be satisfied that when an infant is in execution for a malicious slander we can relieve him from the consequences. In the case of a wife, the husband being responsible, there may be ground for interfering, and that has sometimes been done, as was suggested in *Ex parte Deacon*. But in the case of an infant who has no property, we should exempt him from the only retribution he can make to the Plaintiff if we acceded to this application.

The rest of the Court concurred.

Rule discharged.

ADLARD v. BOOTH.

May 7.

THIS was an action on a bill of exchange and for work and labour.

The Defendant paid money into Court upon the count on the bill of exchange sufficient to cover the amount of the bill, and obtained a verdict on the other count. He had omitted, however, to plead the payment into court, in consequence of which the Plaintiff had a verdict on the first count.

Upon a declaration of two counts, the Defendant paid into Court enough to cover the demand in the first, and obtained a verdict on the second; but

having omitted to plead the payment, as required by the new rules, Held, that he was not entitled to costs.

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The prothonotary having taxed costs for the Defendant, and having declined to tax them for the Plaintiff, on the ground that the Defendant had succeeded in the action,

Petersdorff obtained a rule *nisi* for a review of the taxation, contending that the Defendant could derive no benefit, as to costs, from the payment into Court, having omitted to plead it, as required by the rule which directs that "when money is paid into Court, such payment shall be pleaded in all cases."

Bompas Serjt. who shewed cause, ascribed this omission to sharp practice on the part of the Plaintiff's attorney, and contended that the Plaintiff ought not to profit by it.

TINDAL C. J. The Defendant has not availed himself of the right mode of taking advantage of his payment into Court: the rule says, "when money is paid into Court, such payment shall be pleaded in all cases."

I agree that if there had been any practice on the part of the plaintiff's attorney by which the Defendant was misled, we should not permit him to be a sufferer; but it appears to me that the charge has not been made out, and therefore the rule must be discharged.

The rest of the Court concurred.

Rule absolute.

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GILLOW and Others, Executrix and Executors May 7.
of GILLOW, v. Sir JOHN SCOTT LILLIE.

THE declaration stated that, on the 14th of *August* 1817, by a certain indenture, *Thomas Lillie* and the Defendant, and each of them, did grant unto *George Gillow*, his executors, administrators, and assigns, for, and during the term of the natural lives of *M. M. G.*, *S. G.*, and *R. G.*; in the said indenture mentioned, and the life and lives of the survivors and survivor of them, one annuity or clear yearly sum of 120*l.* And the Defendant did thereby for himself, his heirs, executors, and administrators, covenant, promise, and declare, with and to the said *G. Gillow*, his executors, administrators, and assigns, that they the said *T. Lillie* and the Defendant, or one of them, their or one of their heirs, executors, or administrators, should and would well and truly pay or cause to be paid unto the said *G. Gillow*, his executors, administrators, and assigns, for and during the natural lives of the said *M. M. G.*, *S. G.*, and *R. G.*, and the lives and life of the survivors or survivor of them, the said annuity. And although the said *M. M. G.*, *S. G.*, and *R. G.*, were then respectively living, the said *Thomas Lillie* and the Defendant, had not, nor had either of them, well and truly paid or cause to be paid unto the said *G. Gillow* in his lifetime, or to the said Plaintiffs as executrix, and executors, as aforesaid, since the decease of the said *G. Gillow*, for and during the natural lives of the said *M. M. G.*, *S. G.*, and *R. G.*, the said annuity.

Defendant and an infant who had granted an annuity, covenanted jointly and severally for the due payment of the same: Held, that the infancy of the grantor did not avoid and exonerate the Defendant from his separate contract.

Plea. That the said *Thomas Lillie* in the said indenture named, at the time of the making of the indenture was an infant within the age of twenty-one years, to wit, of the age of twenty years, whereby and according to the

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statute in such case made and provided, the said indenture was and is void in law; and that, the Defendant was ready to verify, &c.

Demurrer and joinder.

Talfourd Serjt., in support of the demurrer, relied on *Han v. Ogle* (a), where it was held that the several covenant of one grantor of an annuity was not avoided by the infancy of another who granted in the same deed.

Merewether Serjt., *contra*. In that case the attention of the Court was not directed to the language of the covenant, that they, or one of them, should pay. And here, the Defendant never intended that he alone and absolutely should be liable to pay the annuity; but only that he should be liable in case of default by the infant. But the engagement by the infant being void, the whole falls to the ground. To induce an infant to join in such an engagement is a misdemeanor; and the Plaintiff, who is *particeps criminis*, cannot come into court to take advantage of his own wrong.

TINDAL C. J. I am not prepared to say that if this were merely a grant of a *joint* annuity by the Defendant and the infant, the consequence pointed out by my brother *Merewether* might not have followed, and that the statutory avoidance of the contract, as to the infant, under 53 G. 3. c. 141. s. 8., — although I do not decide the point, — might not have avoided it as to both. But this action proceeds on the separate grant of the Defendant; and there is no reason for holding a separate grant by a person of full age void, because the party to another separate grant in the same deed is an infant.

The rest of the Court concurred in giving
Judgment for the Plaintiffs.

(a) 4 Taunt. 10.

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LESLIE and Others, Assignees of CUMBERLEGE, May 8.
the Younger, a Bankrupt, v. GUTHRIE.

THE declaration stated that the Defendant, on the 1st of *December* 1833, was indebted to *John Cumberlege* the younger before he became bankrupt, in 2000*l.* for freight payable by the Defendant to the said *J. Cumberlege* the younger for the carriage and conveyance of goods and chattels in and on board of a certain ship or vessel whereof the said *J. Cumberlege* the younger then was owner. That the Defendant afterwards, to wit, on, &c., in consideration of the premises respectively, then promised the said *J. Cumberlege* the younger, before he became bankrupt, to pay him the said sum of money on request; yet the Defendant had not paid the said sum of money, or any part thereof, to the said *J. Cumberlege* the younger before he became bankrupt, or to the Plaintiffs, assignees as aforesaid, or either of them, since the said *J. Cumberlege* the younger became bankrupt: to the plaintiffs' damage of 2000*l.*

To an action by the assignees of a bankrupt ship owner for the freight of a voyage to *India*, accruing to him before his bankruptcy, the Defendant pleaded, that the ship owner before his bankruptcy assigned by deed the freight in question to *I.*, in trust to discharge a debt due from the ship owner to *I.*, and to pay the surplus, if any, to the ship owner; that the Defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the

Plea. That the said sum of 2000*l.* in which the Defendant was in the declaration alleged to have been indebted to the said *J. Cumberlege* the younger, for freight, was a certain sum of money which became due for freight payable by the Defendant for the carriage and conveyance of goods and chattels in and on board of a certain ship or vessel called the *Neptune*, of which the said *J. Cumberlege* the younger then was the owner, in and upon a certain voyage from the *East Indies* to *England*, being part of a certain voyage taken by the said ship or vessel from the port of *London* to the *East Indies* and back to

debt, had been demanded of him by *I.*: Held, a good bar to the action.

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England, upon which the said ship or vessel at the time of making the indenture herein-after mentioned was bound, and which voyage in the said indenture was recited and mentioned. That before the said *J. Cumberlege* the younger became bankrupt as in the declaration mentioned, to wit, on the 15th of *October* 1831, by a certain indenture then made between the said *J. Cumberlege* the younger, before he became bankrupt as aforesaid, of the first part, *Inglis* and others of the other part, and which said indenture was duly sealed and delivered by the said *J. Cumberlege* the younger before he became bankrupt as aforesaid,— after reciting that the said *Inglis* and others had lent and advanced to the said *J. Cumberlege* the younger the sum of 1600*l.*, which the said *J. Cumberlege* the younger did thereby admit, and which in truth and in fact was the case, and that the said *Inglis* and others had applied to the said *J. Cumberlege* the younger to assign over to them the freight and earnings of the said ship *Neptune* on her then present intended voyage from the port of *London* to the *East Indies* and back, and all charter-parties, contracts, agreements, and policies of insurance relating thereto, as collateral security for the due payment of the said sum of 1600*l.* so lent and advanced to him as aforesaid, and also of all such further sum or sums of money as should or might be due and owing by the said *J. Cumberlege* the younger to the said *Inglis* and others for costs of insurance, and upon the balance of all accounts between them, not exceeding in the whole the sum of 3000*l.*, and which the said *J. Cumberlege* the younger had consented and agreed to do, — the said *J. Cumberlege* the younger, before he became bankrupt as aforesaid, in pursuance of the said agreement, and for the considerations aforesaid, and in consideration of the sum of 10*s.* to the said *J. Cumberlege*

the younger paid by the said *Inglis* and others at or before the sealing of the said indenture, did bargain, sell, assign, transfer, and set over unto the said *Inglis* and others, their executors, administrators, and assigns, all and every the said sum and sums of money that then was or were due, or which should or might at any time or times thereafter arise and become due to him, the said *J. Cumberlege* the younger, his executors, administrators, or assigns, by any person or persons whomsoever, for or on account of the freight, earnings, and profits of the said ship or vessel the *Neptune*, under or by virtue of any then existing or future charter-party or charter-parties, or other contract or contracts for or in respect of her said then intended voyage to India and back to England; and all and every policy or policies of assurance which then was or were, or thereafter might be effected on the said freight or freights; and all monies which should or might become due and recoverable under or by virtue thereof, together with all charter-parties, contracts, agreements, and policies of insurance relating thereto; and all the right, title, interest, &c., whatsoever, at law or in equity, of him the said *J. Cumberlege* the younger, of, in, and to the same premises, and every part thereof; to hold, recover, and enjoy the said sum and sums of money so due or to become due for the freight, earnings, and profits of the said ship or vessel the *Neptune*, as aforesaid, and all and singular other the premises thereby assigned or intended so to be, unto the said *Inglis* and others, their executors, administrators, and assigns; in trust nevertheless that they, their executors, or administrators, did and should in the first place thereout deduct, retain to, and reimburse themselves, the said sum of 1600*l.* with interest for the same at and after the rate of 5 per cent. per annum, together with all

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such further sum and sums of money as should or might be due to them upon the balance of accounts between them and the said *J. Cumberlege* the younger, and also all such sum and sums of money, as might be paid by them for insurance of the said freight or freights, with interest and commission thereon, not exceeding in the whole the sum of 3000*l.*; and in the next place, to pay over the surplus, if any, unto the said *J. Cumberlege* the younger, his executors, administrators, or assigns, or to such person or persons as he, or they, might appoint to receive the same; and to, for, and upon no other use, trust, intention, or purpose whatsoever; whereof the Defendant before the said *J. Cumberlege* the younger became bankrupt as aforesaid, to wit, on the 1st of June 1833, had notice. That from the time of the making of the said indenture, until and at the time when the said freight in the declaration mentioned became due, the said sum of 1600*l.*, so lent by the said *Inglis* and others to the said *J. Cumberlege* the younger as aforesaid, together with interest thereon, amounting together to a large sum of money, to wit, 1800*l.*, and certain sums of money paid by the said *Inglis* and others for insurance of the said freight, with interest and commission thereon, and also certain monies due from the said *J. Cumberlege* the younger to the said *Inglis* and others, upon the balance of accounts between them and the said *J. Cumberlege* the younger, were due and owing from the said *J. Cumberlege* the younger to the said *Inglis* and others; all which said monies amounted together to a large sum of money, to wit, 2384*l.* 4*s.* 11*d.* and exceeded the amount due for freight as in the declaration mentioned; and which said sums of money before and at the time of the commencement of this suit remained, and still were due and payable and unpaid to the said *Inglis* and others, who at the time of the said bankruptcy of said *J. Cumberlege*

the younger, and at the time when the Plaintiffs became and were such assignees as aforesaid, and from thence until and at the time when the said freight became due, and until and at the time of the commencement of this suit, claimed to be and were entitled to receive from the Defendant the said sum of money due for freight as in the declaration mentioned, under and by virtue of the said indenture:—and that, the Defendant was ready to verify, &c.

Replication. That at the time of making the said indenture in the said plea mentioned, no charter-party, contract, or agreement whatsoever, for, or in respect of the said freight of the said ship or vessel during the voyage of the said ship or vessel from the *East Indies* to *England*,—and for and on account of which voyage the said sum of 2000*l.* in the declaration was mentioned to have become due and payable,—had been or was made, entered into, or agreed upon, by or on behalf of the said *J. Cumberlege* the younger, then being the owner of the said ship or vessel as aforesaid; and that no freight or money in respect thereof was then due or owing to the said *J. Cumberlege* the younger, in respect of the said voyage in the indenture mentioned; and that, the Plaintiffs were ready to verify.

Demurrer and joinder.

Sir *W. Follett* in support of the demurrer. The replication is ill as tendering an immaterial issue.

It will be contended, however, that the plea is no answer to the action because the assignment of freight by *Cumberlege* before his bankruptcy, on which the Defendant relies, was void; and *Robinson v. Macdonnell* (a), will be cited as establishing that proposition. In that case,

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(a) 5 *M. & S.* 228.

1835. *Robinson and Co.* being indebted to the firm of *Sharp*, by deed of *December* 15th 1810, assigned to the *Sharps*, as a security for their debt, all the freight, earnings, profits, and sum and sums of money then due, or which thereafter might become due on account of a certain ship, and the benefit of all agreements for the hire of the said ship, and all the right, title, and interest of *Robinson and Co.*, any or either of them, to the said several premises. The *Sharps* became bankrupt in *October* 1812, and *Robinson and Co.* in *January* 1813. The ship had sailed on a whaling voyage in *May* 1812, and returned in *December* 1813. And the Defendants, assignees of the *Sharps*, having under the deed of *December* 15. 1810, taken possession of some oil, part of the profit of the voyage, the Plaintiffs, assignees of *Robinson and Co.*, sought to recover the value in *trover*; and Lord *Ellenborough* said, "if that deed is to extend to all freight, earnings, and profits, in subsequent voyages, it is open to the objection made by the Lord Chancellor in *Speldt v. Lechmere*, that it will for ever separate the ship and earnings." That however, was not the only ground of the judgment, for he goes on to say, "there is still another objection however, to the claim of the oil under the deed of 15th of *December* 1810, which is this, that the oil had no existence, actual or potential, at the time this deed was made; and to make a grant or assignment valid, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment; and upon this principle, an assignment of sheep which the lessee was to deliver to the assignor at the end of the lessee's term, or of the wool which should grow upon such sheep as the assignor should thereafter buy, have been held inoperative, because the assignor had not, at the time of the assignment, that which he was professing to assign, either actually or

potentially, but in possibility only. *Wood and Foster's Case* (a), *Grantham v. Hawley*. (b) Now here, at the time of this assignment, the assignors had no property, actual or potential, in this oil: it was altogether matter of chance whether any of it would have been obtained; and even the voyage in which it was obtained does not appear to have been in contemplation. For these reasons we think the Defendants, have no claim under the deed of 15th of December 1810." And what Lord Eldon said in *Speldt v. Lechmere* (c), — "as to the earnings of the ship, this is not like the case of *Mestaer v. Gillispie* (d), upon the benefit of a certain charter-party, but if the defendants are to take the earnings of this ship, and not the ship itself, they would be separated for ever," — he afterwards explained in *Re Ship Warre* (e), where the position to which Lord Ellenborough had referred is considerably limited. "I should find it extremely difficult in considering the question, to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first-intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings for ever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid." The present case however, is materially distinguishable from *Robinson v. Macdonell*, for there the assignment was general, and might occasion the inconvenience of separating the ship and freight for ever: and it did not appear whether the profits accrued before or after the bankruptcy of the assignor. Here the assignment is only of the freight of a single and specified voyage; it became due before *Cumberlege* was a bank-

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(a) 1 *Leon.* 42.(b) *Hob.* 132.(c) 13 *Ves.* 588.(d) 11 *Ves.* 621.(e) 8 *Price*, 269. note.

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rupt; and *Douglas v. Russell* (a), conclusively establishes the validity of such an assignment. There, *A.*, a shipowner, assigned to *B.* the freight earned and to be earned by one of his ships, and afterwards chartered her to *C.* for a voyage to *S.*: the outward freight was paid to *A.* before the ship sailed: the charter-party afterwards was delivered to *B.* by *A.*'s direction, and *B.* gave notice of the assignment to *C.*: afterwards, but before the ship returned, *A.* became bankrupt: it was held, that the homeward freight was not in *A.*'s order and disposition at his bankruptcy, and that *B.* was entitled to it.

Then, if the assignment in this case were valid, even in equity, the Plaintiffs are precluded from suing; for with respect to the bankrupt's rights and liabilities they cannot stand in a better position than the bankrupt: they cannot recover, in a court of law, money which a court of equity would compel them to pay over to the parties entitled under the deed. Thus, in *Gladstone v. Hadwen* (b), Lord *Ellenborough* cites with approbation what fell from *Willes* C. J. in *Scott v. Surman* (c), "my notion is (and that opinion is confirmed by many authorities cited by Mr. *Durnford* in a note), that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seized and possessed, as heirs and executors are, of the estate of their ancestors and testators; but, that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts. And I found this opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point.

(a) 4 *Simon* 524.(b) 1 *M. & S.* 526.(c) *Willes*, 402.

As to the reason of the case, I rely upon the rule concerning circuitry of action; for I think it would be absurd to say, that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them, by which they will be obliged to refund and account, and, according to the case of *Burdett v. Willet*, will likewise have costs decreed against them, and so the effects of the bankrupt, which ought to be applied to the discharge of his debts, will be wasted to no purpose whatever." And in *Crowfoot v. Gurney (a)*, where *S.* being indebted to *J.*, and *G.* being indebted to *S.*, *S.* requested *G.* to pay *J.* whatever might be due from *G.* to *S.*, and *G.* promised *J.* to do so as soon as the amount was ascertained; but after the amount had been ascertained, and before it was paid, *S.* became bankrupt; it was held, that the assignees of *S.* could not sue *G.* for the amount of his debt to *S.*

It may be contended that the legal interest in the freight in question, passes to the Plaintiffs as trustees for *Inglis* and Co., and *Carvalho v. Burn (b)* may be cited as an authority, that if, upon a transfer like that by *Cumberlege*, any residuary interest be reserved, the assignees of the transferor, should he become bankrupt, take the legal estate in the property transferred, in order to secure the residuary interest for the creditors. But here there could be no residuary interest, for it is averred and not controverted that *Inglis's* claim greatly exceeded the amount of the freight assigned as a security for it.

Bompas Serjt., contra. In *Robinson v. Macdonnell*, it is laid down without qualification that the property in

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(a) 9 Bingham 372.

(b) 4 B. & Adol. 382.

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the earnings of a ship cannot be separated from the property in the ship, and that decision cannot be considered as overruled by Lord *Eldon's* subsequent *dicta*. For freight has always been held an inseparable incident of the ship; as in the case of abandonment; which transfers freight subsequently earned; *Case v. Davidson* (a); or of assignment of the ship; the assignee taking care to sue for the freight in the name of the assignor; *Morrison v. Parsons*. (b) Though if a ship be sold pending a voyage, should the ship-owner become bankrupt, the freight passes to his assignees under the bankruptcy; *Chinnery v. Blackburne* (c), *Splidi v. Bowles*. (d) At all events, the transfer of a claim to a debt will be no bar to the suit of the transferor's assignees under a bankruptcy, unless the debtor consented to the arrangement: it is his consent which alone can give it validity in a court of law; *Crowfoot v. Gurney* (e), *Ex parte Monro*. (g) In the latter case, a bond debt was assigned by the obligee, and the bond delivered to the assignee, but notice of the assignment was not given to the obligor previous to the bankruptcy of the obligee, and it was held that the debt remained in the order and disposition of the bankrupt, within the statute 21 Jac. 1. c. 19. In *Cuxon v. Chadley* (h), where *J. C.* being indebted to *S.*, and *R. C.* being indebted to *S.* and also to *J. C.*, it was orally agreed between the three that *S.* should transfer the debt due to him from *J. C.* to the account of *R. C.*, and *S.*, in pursuance of such agreement, delivered to *R. C.* an account, in which *R. C.* was charged with the debt due from *J. C.* to *S.*, it was held that *J. C.* was not thereby discharged: and that case

(a) 5 M. & S. 79.
 (b) 2 Taunt. 407.
 (c) 1 H. Bl. 17. n.
 (d) 10 East, 279.

(e) 9 Bingh. 372.
 (g) Buck. 300.
 (h) 3 B. & C. 591.

was confirmed by *Wharton v. Walker* (a) and *Best v. Argles*. (b) At all events, according to the doctrine established by *Carvalho v. Burn*, the Plaintiffs, as assignees under *Cumberlege's* bankruptcy, have the legal interest in the freight in question; for by the contract itself, a residuary interest is reserved to *Cumberlege*, and the Plaintiffs take under the contract and according to the terms of the contract, and not according to the uncertain event of facts arising subsequently. At the time of the contract it was at least uncertain whether the freight to be earned would amount to more or less than *Cumberlege's* debt to *Inglis*, and if there were only a contingent eventual benefit, the assignees ought to take the legal interest to secure any surplus that might be forthcoming.

Sir *W. Follett* in reply. The principle of *Carvalho v. Burn* applies only to a tangible and not a mere speculative residuary benefit. *Ex parte Monro*, and the cases of that class, turned upon the doctrine of reputed ownership, which can apply only to the case of a secret transfer of the property in visible objects, and not to the transfer of a debt. Besides, here the party liable to pay the freight had notice of the transfer of his debt, and could no longer have considered *Cumberlege* as entitled to receive it; and though, upon the transfer of a debt, the assent of the debtor may be necessary to entitle the transferee to sue in his own name, yet payment to the transferee would be a sufficient discharge to the debtor as against the transferor, and consequently against his assignees, who cannot stand in a better situation than himself. *Best v. Argles* only decided that a mere authority to receive a debt did not with such

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(a) 4 B. & C. 163.

(b) 2 Cr. & Mee. 394.

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certainly amount to a transfer as to induce a court of equity to enforce it.

TINDAL C. J. The question argued in this case was, whether the right to the freight of the ship *Neptune* for a voyage to the *East Indies* and back, passed to the assignees of *Cumberlege* the owner, on his becoming bankrupt, or had passed previously to certain creditors as a security for money advanced by them to *Cumberlege*; because, if before the bankruptcy it passed to any third person, the assignees are not in a condition to claim it.

The two grounds on which it has been argued that the freight might have passed to the assignees, are, first, that according to the decision in *Robinson v. Macdonnell*, unearned freight cannot be the subject of assignment; and undoubtedly if that doctrine is to be taken as widely as it is laid down in some parts of that case, the Plaintiffs might be entitled to sue:

Secondly, that the assignees are at least the legal owners of this freight, according to the decision in *Carvalho v. Burn*, by which it has been established that if upon a transfer by a trader before bankruptcy there be a reservation of any reversionary interest which may accrue to the transferor or his assignees, they shall take the legal interest in the property transferred, and, with a view to assure themselves the benefit of the reversion, be trustees for the parties who claim an interest under the transfer.

Now *Robinson v. Macdonnell* does appear in one part of the judgment to lay it down that future earnings are not assignable. But that is not the only ground on which the decision of the Court proceeded; there are others perfectly distinct, and sufficient of themselves to warrant the judgment; and even if that were the only

ground on which the Court decided, is there no distinction between that case and the present? The deed there assigned all freight, earnings, profits, and sums of money then due, or which might thereafter become due on account of the ship, and the benefit of all agreements for the hire of the said ship. Upon which Lord *Ellenborough* said, "if that deed is to extend to all freight, earnings, and profits, in subsequent voyages, it is open to the objection made by the Lord-Chancellor in *Speldt v. Lechmere*, that it will for ever separate the ship and earnings." In the present case, there is no such general assignment of the earnings of future voyages, but merely of the earnings by virtue of any charter-party or other contract for and in respect of the ship's then intended voyage to *India* and back to *England*. If, therefore, the inconvenience of separating for ever the ship and earnings operated on the Court in *Robinson v. Macdonnell*, that inconvenience has no application to the present case. Again, in *Robinson v. Macdonnell*, it did not appear distinctly whether the earnings claimed under the deed became due before or after the bankruptcy of the party who assigned them. Here they were clearly due before the bankruptcy; and the assignment has been, in effect, the assignment of a specific sum due before the bankruptcy. However, giving the fullest effect to the decision in *Robinson v. Macdonnell*, has that case never been impeached? First, we find in the note to the case in *Price (a)*, Lord *Eldon* says, "I should find it extremely difficult, in considering the question, to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first-intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings for ever from the ship

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(a) *Re Ship Warre*, 8 *Price*, 269.

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itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid :” and then in *Douglas v. Russell* (a), it is expressly ruled that an assignment by the owners of a ship of freight *to be earned*, is good. That case, therefore, furnishes an answer to the objection, unless any difficulty arise from *Cumberlege* being apparent owner of the freight ; but as it is expressly averred that the party liable to pay the freight had notice of the transfer, the consequences of apparent ownership are out of the question.

That brings me to the second point of enquiry, whether the decision in *Carvalho v. Burn* applies to the circumstances of the present case. According to the principles of courts of equity, where, upon a transfer by a trader before his bankruptcy any reversionary interest accrues to his assignees, the immediate legal interest in the property transferred vests in them as trustees for the parties entitled in the first instance, and then for the creditors under the bankruptcy ; and all suits in respect of the immediate interest must be brought in the name of the trustees.

But there is an averment in this declaration which puts an end to any objection arising out of that principle ; for it is alleged, that from the time of the making of the indenture, until and at the time when the said freight in the declaration mentioned became due and payable, the said sum of 1600*l.* so lent by the said *Inglis* and others to the said *J. Cumberlege* the younger, as aforesaid, together with interest thereon, amounting together to a large sum of money, to wit, 1800*l.*, and certain sums of money paid by the said *Inglis* and others for insurance of the said freight, with interest and commission thereon, and also certain monies payable by the

(a) 4 *Simons*, 524.

said *J. Cumberlege* the younger to the said *Inglis* and others upon the balance of accounts between them and the said *J. Cumberlege* the younger, were due and owing from the said *J. Cumberlege* the younger to the said *Inglis* and others, all which said monies amounted together to a large sum of money, to wit, 2384*l.* 4*s.* 11*d.*, and exceeded the amount due for freight as in the declaration mentioned. It is impossible, therefore, that there should be any residuary benefit accruing to the assignees; and as there was nothing for them to take, our judgment must be for the Defendant.

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PARK J. The great pressure made by my brother *Bompas* has been on the case of *Ex parte Monro*; but that case turned on the statute of *James* touching reputed ownership. There could be no reputed ownership here; for the Defendant had express notice of the transfer by *Cumberlege*: and though it is contended that, with a view to obviate the objection arising on the score of reputed ownership is not sufficient to shew that the party liable to pay had notice of the transfer, but that it ought also to be shewn that he assented to it, no authority has been cited for that position. In *Ex parte Monro* it was contended that the delivery of the bond not only took the ordering and disposition of the debt out of the bankrupt, but at the same time put it completely in the power and possession of the assignee of the bond. But it was held that the debt remained in the ordering and disposition of the bankrupt within the statute 21 *Jac.* 1. c. 19.

GASELEE J. I am of the same opinion. It appears on this record, that there was no surplus beneficial interest arising out of the transfer in question, consequently, the principle of *Carvalho v. Burn* does not

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apply, and the legal estate in the property did not pass to the assignees.

BOSANQUET J. I am of the same opinion. In this case the assignment was before the bankruptcy, and the freight assigned became due before the bankruptcy; and the assignment is not of the earnings of all future voyages, but merely the earnings by virtue of any charter-party or other contract for or in respect of the ship's then intended voyage to *India* and back to *England*. The case, therefore, materially differs from those in which there has been an assignment to separate the freight from the vessel in all time to come: here the assignment was only for an intended voyage on which the ship was actually bound; and we have the opinion of Lord *Ellenborough* and Lord *Eldon* that such an assignment will in equity avail against the assignees of a bankrupt, where there is no objection on the score of the reputed ownership continuing in the assignor. It is contended however, that at least the legal interest in the freight in question passes to the assignees, unless the assignment were such as to exclude any residuary benefit to the assignor; and great reliance is placed on the decision in *Carvalho v. Burn*. But there, a merchant who resided at *Liverpool*, was in the habit of making consignments of goods to his agent in *South America*, for sale, on the faith of and against which consignments the consignor drew bills in proportion to their amount, to be paid by the agent out of the proceeds; and the bills were negotiated by the indorsement of the consignor's correspondent in *London*. Some of the bills so indorsed were refused acceptance by the agent; the indorser on receiving information that they had been so dishonoured, requested that the consignor would order his agent, in case he did not pay the consignor's drafts, immediately to hand over to the indorser's agent such property

as he had of the consignor's of an equivalent value to the bills that should not be paid by him; the consignor agreed to do so, but became bankrupt before his order to transfer the goods reached *South America*: and it was held that the bargain between the consignor and his correspondent did not operate as a legal or equitable assignment of the property in the consignor's goods held by his agent, but that they remained the property of the consignor at the time of his bankruptcy, and passed to his assignees.

In the present case the freight has been assigned for a debt due from the assignor before his bankruptcy, — a debt, exceeding the whole amount of the freight; there was no residuary benefit therefore, and the freight did not pass to the bankrupt's assignees.

With respect to the objection raised on the score of reputed ownership on the authority of *Ex parte Monro*, the notice of the transfer given to the Defendant excludes any idea of reputed ownership in the bankrupt.

Judgment for Defendant.

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THE declaration stated, that Defendants, before and at the time of the giving the notice to quit and making the demand therein after mentioned, and from thence until a certain day, to wit, the 14th of *June* 1834, held and enjoyed one undivided moiety or half part, the whole into two equal parts to be divided, of and in certain tenements, to wit, a certain quay or wharf, and certain warehouses, vaults, and buildings, with the ap-

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purtenances, as tenants thereof to the Plaintiff *Thomas Wilkinson*, and one other undivided moiety thereof, as tenants thereof to the Plaintiff *William Stennett*; that is to say, as such tenants thereof respectively from year to year, for so long a time as the Plaintiffs and Defendants should respectively please: the reversion of the one undivided moiety of the said premises with the appurtenances, during all that time belonging to the Plaintiff *Thomas Wilkinson*, and the reversion of the other undivided moiety thereof during all that time belonging to the said *William Stennett*: and thereupon, whilst the Defendants so held and enjoyed the said undivided moieties of the said tenements, with the appurtenances, as tenants thereof to the Plaintiffs respectively as aforesaid, and whilst the said reversions thereof respectively so belonged to the Plaintiffs respectively as aforesaid, to wit, on the 11th of *December*, 1833, the Plaintiffs gave notice in writing to the Defendants, and thereby demanded of and required the Defendants to quit, and to deliver up the possession of the said tenements with the appurtenances to the Plaintiffs, or either of them, on the said 14th of *June* 1834, provided the Defendants' tenancy of the said premises originally commenced at that period of the year, or otherwise to quit and deliver up the possession of the said premises at the end of the current year of their tenancy thereof which should expire next after the end of half a year from the time of their being served with the said notice. And the Plaintiffs averred, that the tenancies aforesaid ended and were duly determined by the said notice. That after the determination of the said tenancies of the Defendants as aforesaid, and whilst the Defendants continued in possession of the said tenements with the appurtenances as aforesaid, and the said Plaintiffs were so entitled to the possession thereof as tenants in common thereof, to wit, on, &c., the Plaintiffs,

by a certain notice in writing then made and signed by them, and delivered to the Defendants, demanded and required the Defendants to deliver the possession of the said tenements with the appurtenances to the Plaintiffs; nevertheless the Defendants not regarding the statute in such case made and provided, did not nor would, at the determination of the said term and tenancies as aforesaid, deliver the possession of the said tenements with the appurtenances, or any part thereof, to the Plaintiffs, or either of them, according to the said notice so given, and the demand so made as aforesaid, but wholly neglected and refused so to do; and on the contrary thereof, wilfully held over the said tenements with the appurtenances, after the determination of the said term, and tenancies, and after the said notice so given as aforesaid, and the said demand so made as aforesaid, for a long space of time, to wit, from thence hitherto, during all which time the Defendants did keep the Plaintiffs, and each of them, out of the possession of the said tenements with the appurtenances, and every part thereof; they, the Plaintiffs, during all that time being entitled to the possession thereof as tenants in common thereof; contrary to the form of the statute in such case made and provided. And the Plaintiffs averred, that the whole of the said tenements with the appurtenances, during the said time of holding over the same, and keeping the Plaintiffs out of the possession thereof as aforesaid, were of great yearly value, to wit, of the yearly value of 200*l.*; and by reason of the premises, and by force of the statute in such case made and provided, the Defendants became liable to pay the Plaintiffs a large sum of money, to wit, the sum of 2666*l.* 13*s.* 4*d.*, being at the rate of double the yearly value of the said tenements with the appurtenances, for so long as the same were so detained as aforesaid; and thereby, and by force of the said statute, an action

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had accrued to the Plaintiffs to demand and have, and they thereby demanded of and from the Defendants the said sum of 2666*l.* 13*s.* 4*d.*: yet the Defendants had not paid the said sum of money above demanded, or any part thereof; to the damage of the Plaintiffs of 200*l.*

Plea. That the Defendants did not before, or at any of the said times in the declaration mentioned, or at any other time whatsoever, hold or enjoy the said undivided moieties of and in the said tenements in the declaration respectively mentioned, or either of them, or any part thereof, as tenants to the Plaintiffs jointly, upon any joint demise or letting whatsoever by them of the same, or any part thereof, to the Defendants; and that, the Defendants were ready to verify, &c.

Demurrer and joinder.

Merewether Serjt. in support of the demurrer. This action being for double value, and not for double rent, is founded not on contract, but on the Defendants' wrong in holding over the premises after the expiration of the lease. And the Plaintiffs ought to join in the action, as they would be entitled to do in an action of trespass for *mesne* profits. *Goodtitle v. Tombs.* (a) It is clear they ought to join in trespass for damage to the property they hold in common; *Com.Dig. Abatement*, B. 10. F. 6.: and to avow jointly in replevin; *Sir W. Jon.* 253.: it has been held also, that they may join in account, *Martin v. Crompe* (b); and in covenant, *Midgley v. Lovelace.* (c) It is true, that in *Powis v. Smith* (d), it was held that tenants in common could not join in *assumpsit* for use and occupation. But according to the report of that case in 1 *Dowling and Ryland*, 492, *Bayley J.* said, "Where one action was sufficient, it would be a manifest injury

(a) 3 *Wils.* 118.

(b) 1 *Ld. Raymd.* 340.

(c) *Carth.* 289.

(d) 5 *B. & Ald.* 850.

to the tenant that he should be put to the expense and and trouble of appearing to two." However, the present action is founded on a tort, for which it is clear tenants in common may jointly sue.

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Comyn, contra. This is an action of debt ; taking it, however, to be founded on a tort, it is in effect an equivalent for an action for use and occupation in which the amount of damages is settled by statute. If so, the case of *Powis v. Smith* is in point for the Defendants. It is clear that, in respect of estate, tenants in common must sever ; in respect of contract, they can only join where they are parties to the contract. *Lit. s. 302. 315, 316.* If the Defendants had been tenants under a demise from the Plaintiffs, they might have taken issue on the plea instead of demurring ; but if there was no joint demise, the plaintiffs have several interests, and can only recover severally, whether in ejectment or in suits for rent.

Merewether. The argument for the Defendants would be just, if this were an action for double rent, because the fixed rent could only be claimed jointly by virtue of a joint demise. But this is an action for double value ; when that value is ascertained, it belongs to tenants in common in moieties, and it is in ease of the occupier that he should be subject to one action only.

TINDAL C. J. This case may be determined by considering what is the situation of an occupier who holds under two tenants in common without any joint demise ; for this action under the statute comes in place of the action which would have lain for the rent if the tenancy had not been at an end. Now *Littleton* says, s. 316., " If two tenants in common make a lease of their tenements to another for term of years, rendering

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to them a certain rent yearly during the term, if the rent be behind, &c., the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty." And in s. 317., "But in an avowry for the said rent they ought to sever, for this is in the realty, as the assize is above." So if there be no joint demise, there must be several actions of debt for rent, for a joint action is not maintainable except upon a joint demise. Here, upon the face of the declaration, it appears that the Defendants held a moiety of the premises under one of the tenants in common, and another moiety under the other. In case of a distress and replevin, therefore, there must have been separate avowries. The damages which the statute gives, being a compensation for rent, ought to stand on the same footing as rent itself; and if the Plaintiffs could neither avow jointly nor sue jointly in debt for rent, so neither can they sue jointly for that which stands in the place of rent. Further than this, parties cannot join in an action for damages, unless the damages when recovered would accrue to them jointly. But how can two tenants in common have a joint interest in the proceeds of several demises? Suppose, after the double value had accrued, one of the two were to die: his share in the damages would go one way, and his share in the land another: the damages to his executor, the land to his heir. *Cutting v. Derby* (a) affords an illustration of the principle, where, in action for double value by one tenant in common, the court said, "Where one certain injury is done to both tenants in common, they shall have one certain remedy; but when the injury is separate they may have several actions."

It is true that that case does not go the length of saying that the tenants in common *must* sever, only that

(a) 2 W. Blk. 1077.

they may: but it shows clearly that they have several interests in their share of the damages.

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PARK J. and GASELEE J. concurred.

BOSANQUET J. I am of the same opinion; and we are borne out by the language of the statute 4 G. 2. c. 28. s. 1., which enacts, "that in case any tenant shall wilfully hold over any lands, tenements, or hereditaments after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or *reversion* of such *lands, tenements, or hereditaments shall belong*, his or their agents thereunto lawfully authorized, then and in such case such person or persons so holding over shall, for and during the time he, she, and they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements, and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the value of the lands."

According to the declaration, the two undivided moieties of this property were so demised that the Defendants held one undivided moiety under one of the Plaintiffs, and the other undivided moiety under his cotenant. There were, in fact, two separate reversions. Now, it is clear the statute only contemplated the case of one entire reversion.

Judgment for Defendants.

1835.

May 8. 12.

GRIFFITH's Fine.

Passing of
fine after
death of
conusee.

TWO of the conusors in this fine lived in *India*; the third in *Wiltshire*, where his conusance was taken April 4, 1835.

The conusee, however, had died, the 29th of *March*, though his death was unknown to the third conusor on the 4th of *April* 1835; and the statute for the abolition of fines, 3 & 4 *W. 4. c. 74.*, came into operation after sending out the *dedimus* to *India*, and before its return.

The fine was levied to enable the conusee to sell some property in execution of the trusts in a will.

Under these circumstances, the Court, on the application of *Merewether* Serjt., allowed the fine to pass as to the two conusors in *India*.

May 9.

ARAYNE v. LLOYD.

No rule for
interpleading
will be granted
after a
suit has been
stayed by in-
junction.

A RULE had been obtained in this cause, calling on certain persons to interplead, but it appearing that the Court of Chancery had stayed the suit by an injunction on the 16th of *April*, the rule for interpleading was

Discharged.

Wightman and *Colquhon* in support of the rule.

Atcherley Serjt., *contra*.

See *Sturgess v. Claude*, 1. *Dowl. Pr. C.* 505.

1835.

BOURDEAUX v. ROWE.

May 9.

SPANKIE Serjt. having obtained a rule *nisi*, for a commission to examine witnesses in this cause,

A commission to examine witnesses may be granted for the trial of an issue directed by the Court of Chancery.

W. H. Watson opposed it, on the ground that this was not in the language of the statute which authorises such commissions, "*an action pending*" in this Court, but an issue out of Chancery which was ordered to be tried here; and that therefore the application for a commission should have been made to the Court of Chancery.

Sed per Curiam. Any thing which affects the circumstances of the trial is the proper subject of application here.

Rule absolute.

KELCEY, Assignee of FORDRED, an Insolvent, v.
MINTER and Another.

May 9.

TO trover by the assignee of *William Fordred* an insolvent, the Defendants pleaded, that before the said *William Fordred* subscribed his petition, to wit, in or as of *Michaelmas* term, in the third year of the reign of our lord the now king, in the Court of our said lord the king before the king himself, the Defendants by the consideration and judgment of the same Court, recovered

A sale of the goods of an insolvent under a *fi. fa.*, issued upon a warrant of attorney given by the insolvent, is invalid if it take place after the goods may

commencement of the insolvent's imprisonment, notwithstanding the goods have been seized under the writ before the imprisonment.

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against the said *W. Fordred* a certain debt of 600*l.*, and also 65*s.* costs, which in and by the same Court were adjudged to them, with their assent, for the damages which they had sustained, as well by occasion of the detaining of the said debt, as for their costs and charges by them about their suit in that behalf expended, whereof the said *W. Fordred* was convicted; as by the record, &c. more fully appeared; that the said judgment being in full force, and the said debt and damage being wholly unpaid, the Defendants for the obtaining satisfaction thereof, afterwards and before the said *W. Fordred* subscribed his said petition, to wit, on, &c. aforesaid, sued and prosecuted out of the said Court of our said lord the king before the king himself, a certain writ of our said lord the king, called a *feri facias*, directed to the sheriff of *Kent*, by which writ our said lord the king commanded the said sheriff that of the goods and chattels of the said *W. Fordred* in the bailiwick of the said sheriff, he should cause to be levied the debt and damages aforesaid; and that he should have that money before our said lord the king at *Westminster*, on the 23rd of *January*, in the said year last aforesaid, to render to them for their debt and damages aforesaid, and that the said sheriff should then have there that writ: which writ afterwards and before the delivery thereof to the said sheriff, as therein-after mentioned, and before the said *W. Fordred* subscribed his said petition, to wit, on, &c., was duly indorsed to levy 444*l.* 1*s.* 7*d.*, besides sheriff's poundage, officers' fees, and all other incidental expenses; and which writ afterwards and before the return thereof, and before the said *W. Fordred* subscribed his said petition, to wit, on, &c., was delivered to one *D. G. James*, Esq., then being sheriff of the said county, to be executed; by virtue of which writ the said *D. G. James* so being such sheriff as aforesaid, afterwards and before the said *W. Fordred* so subscribed his said

petition, to wit, on, &c., seized and took the goods and chattels in the declaration mentioned, for the purpose of levying the monies by the indorsement directed to be levied; which seizure and taking under the said writ, were the same conversion and disposition as in the declaration mentioned; and that, the Defendants were ready to verify.

Replication. That before the said judgment in the plea mentioned was recovered against the said *W. Fordred* by the Defendants to wit, on the 9th of *January* 1833, the said *W. Fordred* executed a certain warrant of attorney, directed and addressed to one *James Boxer* and one *Holden Walker*, described as two of the attornies of his Majesty's Court of K. B. at *Westminster*, jointly and severally, or to any other attorney of the same Court; and thereby, amongst other things, desired and authorized them, the attornies therein named, or any one of them, or any other attorney of the same Court of K. B. aforesaid, to appear for him the said *W. Fordred* in the said Court as of *Michaelmas* term then last, *Hilary* term then next, or any other subsequent term, and then to receive a declaration for him in an action of debt for 600*l.* for money borrowed, at the suit of *John Minter* and *Richard Hobday* the Defendants in the present suit; and thereupon to confess the same action, or else to suffer a judgment by *nil dicit*, or otherwise, to pass against him in the same action, and to be thereupon forthwith entered up against him of record of the said Court for the said sum of 600*l.*, besides costs of suit; as by the said warrant of attorney remaining of record in the said Court of our said lord the king before the king himself, reference being thereunto had, would amongst other things more fully appear: that the said judgment in the plea mentioned was afterwards, to wit, on &c., obtained upon the said warrant of attorney; and the said writ, in the said plea mentioned, was issued upon the said judgment

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so obtained as aforesaid : that the imprisonment of the said *W. Fordred*, from which he was so discharged as in the declaration mentioned, commenced on the 8th of *February* 1833; and that the said goods and chattels in the declaration mentioned, which had theretofore been so seized and taken, as in the plea mentioned, were sold under the said writ so issued and judgment so obtained as aforesaid, after the commencement of the imprisonment of the said *W. Fordred* as aforesaid, contrary to the true intent, meaning and provisions of the statute, in that case made and provided; and that, the Plaintiff was ready to verify, &c.

Rejoinder. That before and at the time of the executing of the said warrant of attorney, the said *W. Fordred* was indebted to the Defendants in a large sum of money, exceeding the sum for which the said warrant of attorney was so given, and for which the said execution so issued as aforesaid, and exceeding the value of the said goods, chattels, and effects, to wit, the sum of 600*l*. That the said *W. Fordred*, being so indebted as aforesaid, the Defendants required the said *W. Fordred* to pay them the said sum of money, or to give them security for the same by a warrant of attorney to confess judgment for the said sum of 600*l*.; and threatened the said *W. Fordred* to sue him for the same, unless he would make such payment, or give such security: Whereupon the said *W. Fordred*, for the purpose of avoiding such suit, and yielding to the request and importunities of the Defendants in that behalf, involuntarily and by such compulsion as aforesaid, executed the said warrant of attorney as a security to the Defendants, for the sum of money so due and owing to them as aforesaid, and which sum of money at the time of the alleged finding and conversion of the said goods, chattels, and effects was, and remained due and owing from the said *W. Fordred* to the Defendants; and still was in

arrear and unpaid to the Defendants; and that, they were ready to verify.

Demurrer and joinder.

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Bayley in support of the demurrer.

The rejoinder tenders an immaterial issue, and does not answer the material fact alleged in the replication—namely, that the sale did not take place until after the commencement of the insolvent's imprisonment. The 7 Geo. 4. c. 57. s. 34. enacts, "that in all cases where any prisoner who shall petition the Court for relief under this act, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and may be a creditor or creditors for the same under this act."

Manning contra. If the Defendants had been the party who sold the goods, the objection raised on the part of the Plaintiff might have some weight; but the only conversion which the Defendants admit on their plea, and for which they are responsible, is the seizure of the goods under the writ before the insolvent's imprisonment. It was the sheriff's duty to have sold the goods at once, and had he done so, no question could have arisen. He, perhaps, may be liable to an action at the suit of the

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Plaintiff, *Notley v. Buck (a)*, but the Defendants discharge themselves from any claim, by showing a seizure under execution for a *bond fide* debt, prior to the insolvent's imprisonment. For aught that appears to the contrary, the money produced by the sale may be now in the sheriff's hands, awaiting the direction of the Court as to its distribution.

TINDAL C. J. In *Notley v. Buck* it was expressly averred in the pleadings that the sheriff had notice of the bankruptcy: he, therefore, was plainly a wrong doer; and though the Court did not say that an action would lie against the execution creditor, yet, on general principles, where a thing is done through the procurement of another, the procurer is as much liable as the agent. The sheriff and his employer sail in the same boat. In the language of the writ, the sheriff is to make the debt; it must be presumed that things proceed in their ordinary course, and that when the sheriff has sold the goods, he has paid over the money to the execution creditor. Besides, the replication here alleges that the sale took place by the authority of the Defendants. The case, therefore, seems to me to be brought within the meaning of the statute; a sale of goods after the imprisonment of the insolvent, upon process which issued before.

The other Judges concurred.

Judgment for the Plaintiff.

(a) 8 B. & C. 160.

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WATSON v. MASKELL.

UPON a rule for setting off the amount of a judgment obtained by one of these parties, against the amount of a judgment obtained by the other, the Court having decided that the set-off could only be allowed subject to the lien of *Watson's* attorney for his costs in the particular cause, — see *antè*, p. 366., —

A question now arose whether this lien was to be enforced to the amount of the attorney's costs as between attorney and client, or only to the amount of his costs, as they would be taxed between party and party.

By rule 93. *Hil. 2 W. 4.* "no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought, provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

Humfrey contended that under this rule the lien must be calculated as between attorney and client. — There are many expenses which an attorney would be authorised and bound to incur for his client, and which his client would be bound to repay, which, nevertheless, could not be allowed on taxing costs as between party and party; as payments for stamps; for the extra costs of an outlawry, *Jenkins v. Biddulph* (a); special retainers, and the like; the set-off in this case, therefore, would be to the prejudice of the attorney, if he were not allowed to enforce his lien to the amount of his costs as between attorney and client.

Upon setting off one judgment against another, subject to the attorney's lien, that lien must be taxed as between attorney and client.

(a) 4 *Bingh.* 160.

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Goulburn Serjt. and Hayes, contra. Under this rule the attorney can only retain his costs as between party and party. The law does not recognise extra costs; *Sinclair v. Eldred (a)*, *Hathaway v. Barrow (b)*, *Webber v. Nicholas (c)*, *Hodges v. Earl of Litchfield (d)*; and it would be a great hardship to make the adverse party pay indirectly, through an attorney's lien, costs which he could not be called on to pay directly. No case has decided that an attorney can recover such extra costs against his client, much less that he can retain them against an adverse party.

TINDAL C. J. The question is, whether, upon the proper interpretation of the rule of *Hil. 2 W. 4.*, an attorney, upon a set-off of judgments between conflicting parties, is entitled to assert his lien on the judgment in favour of his own client, to the extent of his bill of costs, as between him and his client, or to the extent only which his client could call on the opposite party to pay it.

The question involves too propositions: first, what was the extent of the lien before the new rule; secondly, supposing the lien to have formerly included the costs in question, whether, if they were now to be refused, the set-off in the present case would not be allowed to the prejudice of that lien, within the meaning of the new rule.

Now, although there may be no express decision on the point, it has always been considered that an attorney's lien on his client's papers has been to the extent of his bill, subject to be taxed as between attorney and client: and that, not only for his bill of costs in a suit, but for any other demand, as charges for conveying and the like. So with respect to judgments; on

(a) 4 Taunt. 7.
(b) 1 Campb. 151.

(c) 1 Ry. & Moo. 419.
(d) *Antè*, 500.

receiving the amount payable to his client, the attorney has always been allowed to retain all expenses incurred by him in the conduct of the suit, as well as his charges for professional attendance; and there is no decision by which he is limited to the amount that would be taxed as between party and party.

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If that were the practice before *Hil. 2 W. 4.*, surely it would be to the prejudice of the attorney now to limit his lien to the costs taxable as between party and party. I can put no other construction on the rule; and I think, therefore, before one of these payments can be set off against the other, *Watson's* attorney must be allowed so much as shall be found due to him upon taxation of costs, as between attorney and client.

PARK J. and GASELEE J. concurred.

BOSANQUET J. The object of the rule was, that the attorney should be in the same situation as if the money due on the judgment were in his hands. And according to the language of Lord *Mansfield*, the attorney's lien is for his bill of costs.

Rule for allowing the lien accordingly.

DOE dem. SMITH v. GLENFIELD.

May 12.

THIS ejectment was brought on the demise of the assignee of an insolvent debtor for some copyhold property, and a verdict was found for the Plaintiff. The copyhold property of an insolvent debtor vests in his assignee by virtue of the assignment under 7 G. 4. c. 57. s. 11. without entry on the court rolls.

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The transfer to the assignee having been entered only on the minutes of the steward, and not on the court roll,

Talfourd Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground that the lessor of the Plaintiff had no legal title till his name was entered on the court roll.

Scriven Serjt. and *R. V. Richards* showed cause.

The title of the assignee of an insolvent to copyhold property, is complete by the assignment pursuant to sect. 11 of 7 G. 4. c. 57. It is not necessary that he should incur the expense of a fine for admission; and it is only when he seeks to sell the property that he is required by sect. 20. to enter his name on the rolls of the manor.

However, if an entry were necessary to give him a legal title, the entry on the steward's minutes is the original, and of more authority than the entry on the court roll. *Doe v. Calloway*. (a)

The Court Baron is an inferior court; and in an inferior court the minutes are of more authority than the rolls themselves. *Rex v. Hains* (b), *Fisher v. Lane*. (c)

Talfourd. The lord of the manor cannot be deprived of his fine on a transfer unless by express enactment; and when the statute says, sec. 11., the property shall vest in the assignee, the legislature must have meant that it should vest according to the usual forms of proceeding, that is, by procuring the proper entry on the court roll. And that course was always pursued under the bankrupt law, till 6 G. 4. c. 16. rendered it unnecessary.

(a) 6 B. & C. 484.

(b) Comb. 337.

(c) 2 W. Bl. 834.

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TINDAL C. J. As a general rule it is clear that the legal estate in a copyhold cannot be passed without surrender. The question is, whether a statutory title may not be conferred without that formality. Looking to the 11th section of 7 G. 4. c. 57., I think that such is the effect and operation of that statute; it enacts that the prisoner shall, at the time of subscribing his petition, duly execute a conveyance and assignment to the provisional assignee of the court, in such form as is to that act annexed, of the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner; "which conveyance and assignment so executed as aforesaid, in form as aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee."

These are words which must of necessity vest every kind of property in the assignee; and that is rendered more clear by sec. 20., which enacts, "that in case such prisoner shall be entitled to any copyhold, or customary estate, the conveyance and assignment by such provisional assignee to such assignee or assignees as aforesaid shall be entered on the court rolls of the manor of which such copyhold or customary estate shall be holden, and thereupon it shall be lawful for such assignee or assignees to surrender, or convey such copyhold or customary estate to any purchaser or purchasers of the same, from such assignee or assignees as the said Court shall direct."

Unless it were assumed that the assignment carries the copyhold estate, why should a surrender be necessary when the assignee proposes to proceed to a sale? It seems to me that the statute has effected a new mode of transfer, and has rendered a surrender necessary only

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in the case in which the assignee proposes to effect a sale. The object of that is, that the title of the purchaser may appear.

PARK J. I am of the same opinion. The language of sect. 11. is very general. The provisional assignee is ordered to convey to the permanent assignee, and yet, if the argument for the Defendant were well founded, the legal estate would still remain in the insolvent.

GASELEE J. Looking to the period at which the assignment to the provisional assignee is to be made, it is clear that nothing more than the assignment is necessary to pass the estate; for it is provided, that "in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismissal, be null and void to all intents and purposes." And if the assignment of itself did not pass the property, but an entry on the rolls were also necessary, the legislature must have gone on to direct that in case of dismissal of the petition, every surrender entered on the rolls should be set aside. On the contrary, it is only in sect. 20. provided for the first time, that an entry shall be made on the roll for the purpose of sale.

BOSANQUET J. Nothing can be more general than the language of sec. 11. which enacts, "That such prisoner shall, at the time of subscribing the said petition, duly execute a conveyance and assignment to the provisional assignee of the said court, in such form as is to this act annexed, of the estate, right, title, interest, and trust of such prisoner, in and to all the real and personal estate and effects of such prisoner; which conveyance and assignment so executed as aforesaid, in form as aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future

real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the provisional assignee." No entry on the roll therefore is necessary to vest the estate in the provisional assignee. Then by sec. 19. the same language is used, with regard to the transfer from him to the permanent assignee—"And when such assignee or assignees shall have signified to the said court his or their acceptance of the said appointment, the estate, effects, rights and powers of such prisoner, vested in such provisional assignee as aforesaid, shall immediately be conveyed and assigned by such provisional assignee to the said assignee or assignees, in trust for the benefit of such assignee or assignees, and the rest of the creditors of such prisoner, in respect of, or in proportion to their respective debts, according to the provisions of this act; and after such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be, to all intents and purposes, as effectually and legally vested by relation in such assignee or assignees, as if the said conveyance and assignment had been made by such prisoner to him or them." So that the same property which passed to the provisional assignee, passes from him to the permanent assignee. Then comes sect. 20., which provides for the case of sale, and enacts, "That the assignee or assignees of the estate and effects of any such prisoner, shall, with all convenient speed, after his or their accepting such conveyance and assignment as aforesaid, use his or their best endeavours to receive and get in the estate and effects of such prisoner, and shall with all convenient speed make sale of all such estate and effects."

It is only necessary to establish the derivative title of the purchaser that the entry should be made, but not for the title of the assignee.

Rule discharged.

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Ex parte SWIFT.

An attorney having through inadvertence omitted to inscribe his name on the roll of attorneys, although he had observed every other formality necessary for his admission, the court refused to enter it *nunc pro tunc* to defeat an action for penalties incurred by the omission.

AN action having been brought against *Swift* for penalties incurred under 2 G. 2. c. 23., for practising as an attorney in this court, without having had his name duly entered on the roll of attorneys (see *anté*, p. 62., *Humphreys v. Harvey*),

Robinson, on the part of *Swift*, moved that the entry might be made *nunc pro tunc*, as of *Trinity* term 1833.

The applicant had complied with all the forms necessary to entitle him to practice, except the mere entry on the roll; that entry had been omitted by inadvertence, at most, in the applicant, if not by an oversight of the officers of the court; the applicant had suffered by the loss of his costs in *Humphreys v. Harvey*; and he was now sued for penalties in the name of the clerk of the attorney who had deprived him of his costs upon this technical objection. It was true that compliance with this application might deprive the party suing for penalties of an advantage he expected to obtain; but that objection applied to every case of amendment which, in furtherance of justice, was always permitted, as to matters of form, even at the latest stage of proceedings. *Mellish v. Richardson*. (a) The enrolment of admission was no more than the record of admission: and as the applicant was admitted in *Trinity* term 1833, the record might be made up now. In *ex parte Fry* (b), where no penal action was pending, the Court made the entry on the roll some time after admission.

(a) 7 B. & C. 819.

(b) 3 Dowl. Pr. C. 338.

TINDAL C. J. I fear we have no authority to accede to the present application. If the interests of another party had not been involved, we might have lent our aid to the applicant, to release him from future embarrassment; but here we are required by our own act to arrest an action already commenced. That is going further than we feel authorised to do. The power of entering judgments *nunc pro tunc* is always exercised subject to the rights of third persons: as, in the case of executors, it is so exercised as not to interfere with intervening payments.

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The rest of the Court concurred.

Rule refused.

MATTHEWS v. SWIFT.

May 13.

THE Defendant having demurred specially to the Plaintiff's declaration, in a penal action commenced against the Defendant in *Hilary* term, on the statute 2 G. 2. c. 23. for practising as an attorney without being duly enrolled, — (see the preceding case), —

(See the preceding case.)
But in such action they also refused to allow plaintiff to amend after special demurrer.

Bompas, Serjt. on the part of the Plaintiff, obtained a rule *nisi* for leave to amend.

Robinson, who showed cause, contended that the Court being aware of the merits of this case, from the Defendant having been the party who was deprived of his costs, in *Humphreys v. Harvey*, *antè*, p. 62., would not assist the Plaintiff by permitting, in the exercise of their discretion, an amendment which would further no ends of

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justice. In the conduct of a penal action the Courts require great exactness, and will not grant a new trial except for misdirection; *Brook v. Middleton (a)*, *Rex v. Mann (b)*; and the Plaintiff was the less entitled to indulgence, as he had delayed his action from *May 1834*, when the omission of the Defendant's name on the roll was pointed out, to *January 1835*. *Ranking v. Marsh. (c)*

Bompas. In the exercise of their discretion as to amendments, the Courts are guided by the rules of law, and look upon all kinds of action with equal favour. When the legislature has determined that certain actions shall be brought, it would not advance the ends of justice, but rather tend to defeat vested interests, if the Court were to view such actions with disfavour, or to look to the merits of the cause upon a question of form. Accordingly, amendments have been allowed in penal actions, even after the time prescribed for suing has expired; *Maddock v. Hammett (d)*; and the *similiter* has been added, even after a trial; *Rex v. Mayor of Grampound. (e)* It is true the rigour with which amendments have been refused in writs of right may seem at variance with the position now contended for; but that is the only exception: it has never been extended to penal actions.

TINDAL C. J. All the cases have laid it down that amendments are to be made in the discretion of the Court, and only in furtherance of justice. I admit that such discretion must be exercised according to law, and that the Courts cannot take up and act upon an individual discretion; but we have a right on such occasions to consider the nature of the action, though not to weigh

(a) 10 *East*, 268.
 (b) 4 *M. & S.* 338.
 (c) 8 *T. R.* 30.

(d) 7 *T. R.* 55.
 (e) 7 *T. R.* 699.

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the merits of the cause. Here the whole matter has been before us upon a former occasion; and we now find a penal action brought upon that which was an omission by mere inadvertence, and not with any intention to elude the provisions of the statute on which this Plaintiff seeks to recover a penalty. In such an action we are warranted in withholding leave to amend.

GASELEE J. concurred.

VAUGHAN J. I cannot consider this an amendment in favour of justice. In some sort we have judicial notice of all the circumstances of the cause, for they were before us in *Humphreys v. Harvey*, and that, through the instrumentality of the party whose clerk now sues the Defendant: it would be a measure of great severity to assist in visiting the Defendant with a heavy penalty for a mere inadvertence. If there is to be no difference as to the exercise of the discretion to allow amendments, in different forms of action, how is it that they have always been refused in writs of right? If the Court is to have any discretion at all, I would never consent to permit the amendment on this occasion.

BOSANQUET J. It would not further the ends of justice if the Court were to allow the amendment now required. I agree, the Courts are not to refuse an amendment because they may disapprove of the law which authorises the action in which it is required; but that is not the ground of our refusal to comply with this application. The circumstances of the case were not such as to bring the Defendant within the spirit of the law on which the Plaintiff sues; and the action is not one in which the Plaintiff has any claim to be assisted.

Rule discharged.

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BRADLEY v. MILNES.

Defendant having been arrested for 65*l.*, when there was not probable cause for arresting him for more than 44*l.* the Court allowed him his costs under 43 G. 3. c. 46.

THE Plaintiff had contracted, at certain fixed prices, to do the iron-work of four houses about to be built by the Defendant.

He afterwards agreed to do two more at the same price; and subsequently did a seventh and eighth without coming to any express agreement.

It was not clear whether the last four were to be paid for by the Defendant or by one *Ponsford*.

The Defendant paid for the first four according to the contract; and the Plaintiff sent in a bill to *Ponsford* charging him for all the four last according to the amount fixed by the contract with the Defendant for the four first.

Ponsford hesitating to pay, the Plaintiff threatened to arrest the Defendant for the expense of the last four houses, estimated according to measure and value, and not according to the contract for the first four, if *Ponsford* failed to pay the bill sent in.

Ponsford refusing to pay, the Defendant was arrested for 65*l.* 16*s.* 6*d.*, being the charge for doing the four last houses, according to measure and value. Upon the trial of the cause the jury gave a verdict for 44*l.* 4*s.* 10*d.*, which was the amount of doing the four according to the terms of the contract. Upon which,

Atcherley Serjt. obtained a rule *nisi* to tax the Defendant his costs under 43 G. 3. c. 46. as having been arrested without reasonable or probable cause for a larger sum than the Plaintiff knew to be due to him.

Talfourd Serjt. and S. B. Harrison shewed cause.

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The excess for which the Defendant was arrested was not sufficiently large to occasion any inconvenience in procuring bail, or to indicate any malice on the part of the Plaintiff. As there was no express contract with respect to two of the houses, the Plaintiff might easily have fallen into a mistake.

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Aitcherley and R. V. Richards, contra. The Plaintiff proceeded for the larger amount without probable cause, for after he had delivered a bill to *Ponsford*, according to the terms of the contract, it could not have been by mistake that he claimed a larger amount of the Defendant: and if there were no probable cause for the excessive demand, the Defendant is entitled to his costs whether the Plaintiff were actuated by malice or not. *Gompertz v. Denton (a), Donlan v. Brett. (b)*

TINDAL C. J. The only question is, has it been made clear to us that the Plaintiff had no reasonable or probable cause for arresting the Defendant for 65*l.* 16*s.* 6*d.*?

The verdict is for 44*l.* 14*s.* 10*d.* Whether the larger or the smaller sum were due, depends on the question whether the four houses in question were to be done according to the terms of a contract for four others, or according to measure and value. Now it is quite clear that two of the four in question were to be done according to the first contract; and even if the remaining two were to be charged according to measure and value, that would not bring the Plaintiff's demand to 65*l.* or near it; the difference between the contract and the measure and value charge upon the whole four being more than 21*l.* I think, therefore, that there was no reasonable or

(a) 1 Cr. & Moo. 207.

(b) 10 B. & C. 117.

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probable cause for an arrest to the amount in question, and consequently that this rule should be made absolute.

GASELEE J. I have some doubts whether the Plaintiff considered he was bound by the terms of the contract as to all the eight houses, and should prefer his entering a verdict without costs; but as the rest of the Court entertain a different view of the matter, the rule must be absolute.

VAUGHAN J. It is clear the Plaintiff arrested the Defendant for the larger amount because he was irritated at *Ponsford's* refusal to pay the smaller.

BOSANQUET J. I think it clear there was no reasonable or probable cause for an arrest to this amount.

Rule absolute.

It was ordered that under this rule the Defendant should not have his costs of an unsuccessful application for a new trial, and that the Plaintiff should not have his costs of resisting that application.

May 13.

ATKINSON v. BAYNTUN.

The Court allowed Defendant to amend his plea after judgment on demurrer, upon an affidavit that material facts had come to his knowledge after such judgment.

THE Defendant in consequence of information acquired since the decision of this cause, *anté*, p. 444, having procured an order from a Judge at chambers, to amend his fourth plea, by inserting an averment that the sum for which the second execution issued against the

Manleys had included the sum indorsed on the first writ of execution,

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Sir *W. Follett* obtained a rule *nisi*, to discharge the Judge's order, on the ground that the application to amend was too late, and too extensive; substituting a new plea rather than an amendment of the old one.

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Talfourd Serj. and *Manning* now shewed cause upon an affidavit stating that after the argument of the demurrer, the Plaintiff had on the 29th of *January* delivered to the Defendant an account of the several sums received by him on account of the mortgage, and that the Defendant, until he received such account, was ignorant what sums had been received by the Plaintiff. They referred to the *King v. Archbishop of York (a)*, where under a Judge's order, two counts were added in *quare impedit*, a year after the declaration had been filed; and to *Wood v. Plant (b)*, where *Mansfield* C. J., speaking of Judge's orders, said, "The effect of these orders was much considered in the case of *The King v. Wilkes*, 4 *Burr.* 2570. They are as binding as any act of the Court, though they are not entered and made rules of court, unless it be necessary to enforce them by attachment."

If the present rule were made absolute, the Defendant would have been precluded by the new rules of pleading from shewing that the Plaintiff had no cause of action, which he might formerly have done under the general issue.

Sir *W. Follett*. The application to amend should have been made to the Court at the time of the argument.

The effect of the present order is to give the Defend-

(a) 1 *Adol. & Ell.* 394.

(b) 1 *Taunt.* 44.

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BAYNTUN.

ant a rehearing, and enable him to supply the defects of his case after judgment: and the amendment proposed does no more than raise the same point which has been already discussed and decided.

TINDAL C. J. The proper course has not been taken in this case; for the application to amend should have been made at the time of the argument. But the circumstance of the fact now relied on having come to the knowledge of the Defendant since judgment was given, seems to make a difference in the case.

If the application had been made at the time of the argument, we should have allowed the amendment; and though there is no express decision on the point, we think it ought to be allowed now.

GASELEE J. and VAUGHAN J. concurred.

BOSANQUET J. The Court does in some cases allow amendment after argument, and probably would have done so here. I do not approve of the course which has been taken, but think that under all the circumstances, the Defendant should be allowed to amend.

Rule to set aside the Judge's order discharged.

But the Defendant to pay the costs of the rule, as well as of the amendment, because the application to amend ought to have been made to the court.

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GIBSON and Another, Assignees of DAVID May 13.
RANKINE, a Bankrupt, v. BELL.

THE declaration stated that *David Rankine*, before he became bankrupt, and before the making of the promise of the Defendant therein-after next mentioned, had sold to the Defendant, and the Defendant had then purchased of the said *D. Rankine* divers, to wit, 5 butts, 7 hogsheads and 2 quarter casks of wine, and 166 dozen bottles of wine of great value, at and for certain prices or sums of money, amounting in the whole to a large sum of money, to wit, 535*l.* 10*s.*; that the Defendant had in part payment, and on account thereof, accepted three several bills of exchange, respectively bearing date the 31st of *October 1833*, drawn by the said *D. Rankine* upon the Defendant; to wit, a certain bill of exchange for the payment of the sum of 165*l.* 3*s.* six months after the date thereof; a certain other bill of exchange for the payment of the sum of 165*l.* 3*s.* nine months after the date thereof; and a certain other bill of exchange for the payment of the sum of 165*l.* 4*s.* twelve months after the date thereof: that it was agreed by and between the Defendant and the said *D. Rankine*, that the Defendant should deliver to the said *D. Rankine* in further payment and on account of the said sum of 535*l.* 10*s.*, a pipe of port wine valued at 50*l.* more or less, and that any difference there might then be between the sum to which the said three several bills of exchange so drawn upon and accepted by the Defendant, and the price of the said pipe of port wine so to be delivered by him to the said *D. Rankine* as aforesaid should amount, and the said sum of 535*l.* 10*s.*

Held, that a defendant might set off a debt due to him from a bankrupt for money lent, &c. against a claim by the bankrupt's assignees on Defendant for not accepting, pursuant to agreement, a bill of exchange by way of part payment for goods sold and delivered by the bankrupt to the Defendant.

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so to be paid by the Defendant to the said *D. Rankine* for the said first mentioned wines as aforesaid, should become and be the subject of future arrangement between the Defendant and the said *D. Rankine*: of all which premises the Defendant had notice; and thereupon, before the said *D. Rankine* became bankrupt, and also before the said bill of exchange therein-before firstly mentioned became due and payable according to the tenor and effect thereof, to wit, on the 25th of *November* in the year aforesaid, in consideration that the said *D. Rankine*, at the request of the Defendant, would cancel and destroy the said last-mentioned bill of exchange for 165*l.* 4*s.*, and would not require the Defendant to deliver the said pipe of port wine according to the said agreement in that behalf, the Defendant promised the said *D. Rankine* before he became bankrupt, to accept divers, to wit, three other bills of exchange to be respectively drawn by the said *D. Rankine* upon the Defendant, to wit, a bill of exchange to bear date the 15th of *November* in the year aforesaid, for the payment of the sum of 45*l.* three months after the date thereof; another bill of exchange to bear date the 25th of *November* in the year aforesaid, for the payment of the sum of 50*l.* three months after the date thereof; and a third bill of exchange for the payment of the sum of 110*l.* 3*s.*, to be drawn at such time and to bear such date as to allow the Defendant ten months for the payment of the said sum of 110*l.* 3*s.*, being the balance then due and owing from the Defendant to the said *D. Rankine* upon the account aforesaid; and to deliver the said last mentioned three bills of exchange to the said *D. Rankine* so accepted as aforesaid, when the Defendant should be thereunto afterwards requested. The Plaintiffs then averred that the said *D. Rankine*, confiding in the said promise of the Defendant, did afterwards, and before he became bankrupt,

and also before the said bill of exchange therein-before firstly mentioned became due and payable according to the tenor and effect thereof, to wit, on, &c., cancel and destroy the last mentioned bill of exchange for 165*l.* 4*s.*; of which the Defendant then had notice: and although the Defendant, in part performance of his said promise, did afterwards and before the said *D. Rankine* became bankrupt, to wit, on, &c., accept the said several bills of exchange for the payment of the said several sums of 45*l.* and 50*l.*, and deliver the same so accepted to the said *D. Rankine*; and although the said *D. Rankine* did afterwards, to wit, on, &c., draw upon and deliver to the Defendant a certain other bill of exchange at such time and bearing such date as would allow the Defendant ten months for the payment of the said balance, to wit, bearing date the 2d of *January* 1834, for the payment of the said sum of 110*l.* 3*s.*, eight months after the date thereof, and did then request the Defendant to accept the said last mentioned bill of exchange, and to deliver the same so accepted to him the said *D. Rankine*; And although the Plaintiffs, as assignees as aforesaid, afterwards and after the said *D. Rankine* became a bankrupt, to wit, on the 31st of *January* in the year aforesaid, and afterwards, did also request the Defendant to accept the said last mentioned bill of exchange, and to deliver the same so accepted to them the Plaintiffs as assignees as aforesaid; and although the said *D. Rankine* before he became bankrupt, and the Plaintiffs, as assignees as aforesaid, since the said *D. Rankine* became bankrupt, had not nor had any or either of them at any time required the Defendant to deliver the said pipe of port wine to the said *D. Rankine*, or to the Plaintiffs as assignees as aforesaid, or to any or either of them; yet the Defendant, not regarding his said promise, but contriving and wrongfully intending to deceive and defraud the said *D. Rankine* before he became bankrupt, and the Plaintiffs as as-

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signees as aforesaid, since the bankruptcy of the said *D. Rankine* in that behalf, did not nor would when he was so requested as aforesaid, or at any time before or afterwards accept the said last mentioned bill of exchange, or deliver the same so accepted to the said *D. Rankine* before he became bankrupt, or to the Plaintiffs, as assignees as aforesaid, or either of them, since the bankruptcy of the said *D. Rankine*.

There was also a count for goods sold and delivered; for money lent; for money paid to the use of Defendant; for money had and received; and for money found to be due on an account stated.

The Defendant pleaded, first, that he did not promise in manner and form as the Plaintiffs had above complained against him, &c.; and for a further plea as to the first count of the declaration, that before and at the time of the date and issuing forth of the *fiat* in bankruptcy under and by virtue of which the said *David Rankine* was found and adjudged to be such bankrupt as aforesaid, to wit, on the 13th of *January* 1834, the said *David* was indebted to the Defendant in 300*l.* for money by the Defendant before then lent and advanced to and paid, laid out, and expended for the said *David* at his request, and for money by the said *David* before then had and received to and for the use of the Defendant; that the said sum of money still remained unpaid and unsatisfied to the Defendant; and that the Defendant had not, when he gave credit to the said *David* in respect of the said sum of money or any part thereof, notice of any act of bankruptcy by the said *David* committed; which said sum of money so due, unpaid, and unsatisfied to the Defendant as aforesaid, exceeded any demand of the said *David* before his said bankruptcy, and of the Plaintiffs as assignees as aforesaid, since the said bankruptcy in respect of the matters in the first count alleged; of all which premises the Plain-

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tiffs had notice before and at the time of the commencement of this action; and out of and against which said sum so due, unpaid, and unsatisfied to the Defendant as aforesaid, the Defendant was ready and willing, and thereby offered to allow and set off the full amount of such demand; and that, the Defendant was ready to verify, &c. And for a further plea to the said declaration, except so far as related to the said first count, the Defendant said that before and at the time of the date and issuing forth of the *fiat* in bankruptcy under and by virtue of which the said *David Rankine* was found and adjudged to be such bankrupt as aforesaid, to wit, on, &c., the said *David* was indebted to the Defendant in 300*l.* for money by the Defendant before then lent and advanced to and paid, laid out, and expended for the said *David* at his request, and for money by the said *David* before then had and received for the use of the Defendant; that the said sum of money still remained wholly unpaid and unsatisfied to the Defendant; and that the Defendant had not when he gave credit to the said *David* in respect of the said sum of money, or any part thereof, notice of any act of bankruptcy by the said *David* committed; which said sum of money so due, unpaid, and unsatisfied to the Defendant as in this plea aforesaid, exceeded the amount of the monies wherein the Defendant was indebted to the said *David* as in the declaration in that behalf mentioned, or any demand of the said *David* before his bankruptcy, and of the Plaintiffs as assignees since the bankruptcy in respect of those monies; of all which premises the Plaintiffs had notice before and at the time of the commencement of this action, and out of and against which said sums of money so due, unpaid, and unsatisfied to the Defendant as aforesaid, the Defendant was ready and willing, and thereby offered to allow and set off the full amount of the said monies wherein the Defendant was

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indebted to the said *David*, and of any such demand as aforesaid in respect thereof; and that, the Defendant was ready to verify &c.

In the replication, the Plaintiffs joined issue on the first plea, and demurred to the second for the following causes: — That the debt in that plea mentioned as due to the Defendant, and the cause of action in the first count of the declaration mentioned, were not mutual debts or mutual credits capable of being set off against each other; that the cause of action in that count was not one to which a set-off could be pleaded; and also that the second plea was pleaded to the first count only of the declaration, whereas if the cause of action in that count was one to which a set-off could be pleaded, then as the causes of action in the residue of the declaration were also of a kind to which a set-off might be pleaded, a plea of set-off to the first count severally, accompanied by another plea of set-off to the residue of the declaration severally, was manifestly insufficient, because it amounted to no more than that *D. Rankine* was indebted to the Defendant to an amount equal or greater than a *part* of the amount which the Plaintiffs as assignees were entitled to claim of the Defendant: That the said second plea tended to an immaterial and frivolous issue, and was in that respect informal and insufficient. As to the third plea, the Plaintiffs replied that the said *David* was not before or at the time of the date or issuing forth of the said *fiat* in bankruptcy, indebted to the Defendant in manner and form as the Defendant had above in that behalf alleged; and that, the Plaintiffs prayed might be enquired of by the country, &c.

Stephen Serjt. in support of the demurrer.

First, the Defendant cannot plead two set-offs to different parts of the action; the statute *G. 2.* gives the set-off as an answer to the whole action, and if it were not

pleaded to the whole the Plaintiff might be tricked. Suppose 100*l.* to be due to the Plaintiff on one count, and another 100*l.* on a second, and suppose the Plaintiff to owe the Defendant 150*l.*; if the Defendant might plead a set off of 150*l.* to the first count, and the same to the second count, he would answer a demand for 200*l.*, with a claim of no more than 150*l.*

Secondly, that which the Plaintiffs claim is neither a mutual debt nor a mutual credit, and, therefore, cannot be open to a set-off. It is not a debt, since the bill, for refusing to accept which the Defendant is now sued, would not have been due till *September 1834*; this action was commenced in *July 1834*, and there could be no debt till the bill was due; *Mussen v. Price* (a), *Dutton v. Solomonson* (b), *Brook v. White* (c), *Hutchinson v. Reid* (d), *Hoskins v. Duperoy* (e) It is, therefore, only a claim for damages incurred by the refusal to accept the bill. And such a claim is not a mutual credit; for though in *Smith v. Hodson* (g) it was held that the payment by the defendant of an acceptance lent by the bankrupt was a mutual credit, yet *Rose v. Hart* (h) puts the limits to the rule, and shews that nothing is a mutual credit which will not terminate in a debt. In *Glennie v. Edmunds* (i) it was held that a loss on a policy could not be set off against the premium, on the ground that the action sounded in damages. In *Sampson v. Burton* (k) it was held that a guaranty against contingent damages could not form the subject of a mutual credit under the 5 G. 3. c. 30. s. 28.; and in *Rose v. Sims* (l) damages arising from a refusal to indorse a bill were held not to constitute a mutual credit.

(a) 4 *East*, 147.(b) 3 *B. & P.* 582.(c) 1 *New Rep.* 330.(d) 3 *Campb.* 329.(e) 9 *East*, 498.(g) 4 *T. R.* 211.(h) 8 *Taunt.* 499.(i) 4 *Taunt.* 775.(k) 2 *B. & B.* 89.(l) 1 *B. & Adol.* 526.

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Henderson contra. To raise the first objection, the Plaintiff ought to have demurred to both the pleas of set-off; but having taken issue on the second of them, he is precluded from saying that the second set-off exists. As to the first, this demand is at all events a mutual credit under the bankrupt act, because it arises out of a sale, and would certainly terminate in a debt. That distinguishes it from *Rose v. Sims*, where the claim arose, not from an act of buying and selling, but from a collateral liability the extent of which remained to be found by a jury.

But it may even be called a debt within the statutes of set-off, for the bill which the Defendant declined to accept was to be given for a sum due on a balance of account. The question must be determined by the substance of the transaction, and not by the accident that the Plaintiff sues in the form prescribed for unliquidated damages. In substance this is a debt. *Sampson v. Burton* was a case of damages arising out of a guaranty; in *Glennie v. Edmunds* the amount due was not ascertained at the time of the bankruptcy; in *Hoskins v. Duperoy* the question was as to the sufficiency of a petitioning creditor's debt; and a demand which would not constitute a good petitioning creditor's debt, may nevertheless be enforced in the way of set-off. But in *Utterson v. Vernon (a)* it was held that when a creditor has a demand on his debtor which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved as a debt under the commission. If so, there can be no objection to allowing a set-off in respect of a similar demand.

Stephen in reply relied chiefly on *Rose v. Sims*.

Cur. adv. vult.

TINDAL C. J. In this case, the Plaintiffs have taken two objections to the special plea of the Defendant, pleaded by him to the first count of the declaration: one, a formal objection assigned for cause of special demurrer, the other an objection in point of law.

As to the formal objection, we think the Plaintiffs cannot avail themselves thereof in the present state of the record. The Plaintiffs have demurred specially to the first plea of set-off, pleaded to the first count, and have traversed the second plea of set-off, pleaded to the second count. As against the Plaintiffs therefore, who have denied the facts stated in the second plea to be true, it may be taken that the facts alleged in it are not in existence; that is, as if there were no set-off in point of fact against the second count of the declaration. The plea of set-off to the first count may therefore be considered as if it stood alone; and in that case, there could be no objection to a Defendant pleading a set-off to one count only of a declaration. Even if the Plaintiff had traversed each plea separately, and gone to trial upon separate issues on those pleas, we cannot see that the difficulty urged by the Plaintiffs could ever have taken place. For after the Defendant had given evidence of the items of his set-off against the first count, he would not be allowed to give evidence of the same items a second time, as an answer to the demand in the second count. Unless therefore the whole set-off was large enough to cover the demands in both counts, the Plaintiffs must have recovered either on the one count or the other. And we think further, that if the objection intended to be taken was the joining on the record two separate pleas of set-off, one to each of the counts of the declaration, the demurrer should have extended to both pleas, and the misjoinder have been then alleged as the ground of demurrer; for the putting of the one plea

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upon the record is as much to be objected to as the placing of the other there.

With respect to the objection in matter of substance to the first plea of set-off, the question is, whether the cause of action stated in the first count of the declaration, and the debts alleged in the plea to have been due from the bankrupt to the Defendant, before and at the time of his bankruptcy, can be considered "as mutual *credits* between those parties," so that "the one *debt or demand*" may be set off against the other within the meaning of the statute 6 G. 4. c. 16. s. 50.

Looking to the *form* of the first count of the declaration, it is a claim for unliquidated damages against the Defendant, for not accepting a bill of exchange according to a special agreement entered into between the Defendant and the bankrupt. But that agreement appears on the face of the first count to have been in substance a contract to accept a bill in payment of the remainder of the price of certain goods, sold and delivered by the bankrupt to the Defendant: and the bill of exchange is expressly alleged in that count to have been drawn "for the balance then due and owing from the Defendant to the said bankrupt upon the account aforesaid." In substance therefore, the bill, if accepted, would have been a security for the payment at a future day of a settled and ascertained balance due upon an account, in which the price of goods sold to the Defendant formed one side, and partial payment made by the Defendant the other side. It is to be observed further, that the Plaintiffs, although they have brought a special action of *assumpsit*, have stated no special damage in their declaration; so that the measure of damage to which the jury would be confined in their verdict, is necessarily a mere matter of calculation, viz., the amount for which the bill was drawn, together with the interest

due upon it, if the time of payment was passed ; or the amount of the bill, *minus* the discount, if the bill was not then due. And the question is, whether this is such a *credit* given by the bankrupt to the Defendant as comes within the meaning of the clause above referred to.

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 GIBSON
v.
BALL.

The principle which the bankrupt laws seem to have had in view from the earliest time to the last provisions made therein, is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on either side. That this was the practice of the commissioners of bankrupt long before any statutory provision on the subject, appears clear from the two earliest decided cases ; *Anonymous* (a) before Lord Chief Justice *North*, and *Chapman v. Derby*. (b)

The first statute which made any express provision on the subject, was the expired statute 4 & 5 *Anne*, c. 17. By that statute it was enacted in the eleventh section, that where there hath been mutual credit given between the bankrupt and any debtor, and the accounts are open and unbalanced, it shall be lawful for the commissioners or *assignees* to adjust the account, and the debtor shall not be compelled to pay more than shall appear to be due on such balance. This provision of the expired statute of *Anne*, is re-enacted in the twenty-eighth section of the 5 G. 2. c. 30., with some variation in the expression, that section enacting that “ the commissioners or assignees shall state the account between them, and one debt may be set against another, and what shall happen to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively.” This statute continued in force

(a) 1 *Msd.* 215.(b) 2 *Fern.* 117. (1689.)

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BELL.

until the 46 G. 3. c. 135. s. 3., which provides, that where there hath been mutual credit given, or mutual debts between the bankrupt and any other person, "one debt or demand may be set against the other, notwithstanding any secret act of bankruptcy before committed." The same language is continued in the last statute 6 G. 4.; so that from the earliest practice to the latest provision by statute, the object seems to have been, that the account should be stated as between merchant and merchant, and that whatever would be in ordinary practice a pecuniary item in such account, should be the subject of set-off; and we think the demand of the bankrupt against the Defendant under the circumstances stated upon this record, falls clearly within this description.

The cases upon which the Plaintiffs have principally relied in argument, are two; the case of *Rose v. Hart* (a) and *Rose v. Sims*. (b) In the former, Lord Chief Justice Gibbs, in giving the judgment of the Court, has laid down the rule of interpretation, that by *credit*, the legislature meant "such credits only as must in their nature terminate in debts;" a distinction that is adopted by the Court of King's Bench in the latter case of *Rose v. Sims*. *L. R. 15 Q. B. 555*.

Now it is observable that in giving judgment in the former case, the Chief Justice states the law of set-off to depend upon the enactment in the 5 G. 2. c. 30. s. 28., and lays great stress upon the circumstance, that it is enacted merely in the final words of the clause "that one *debt* shall be set against another." But, in point of fact, the law of set-off at that time was governed, not by the 5 G. 2. only, but also by the 46 G. 3. c. 135. s. 3.) by which latter statute it was enacted, as before observed, "that one debt or demand" may be set off

(a) 8 Taunt. 499.

(b) 1 B. & Adol. 526.

against another; and it is difficult to see for what purpose such latter word can have been introduced, and have been since continued in the fiftieth section of the last bankrupt act, except for the purpose of giving a greater latitude than the strict meaning of the word debt would of itself import. Without, however, relying on the inference from the introduction of the word "demand," and taking the explanation of the word *credit* with the restriction adopted by the Courts of C. P. and B. R., we think the claim of the bankrupt in this case is one which would in its nature terminate *in debt* and nothing else. If the demand had not been enforced until after the time for which the bill was to run, the demand became actually a debt for which the bankrupt might have brought his action for goods sold, or on an account stated. If enforced before the time had expired, his demand was one which must become a debt in a short time, and of which the present value was determinable by deducting the discount for the time the bill had still to run; and as to the case of *Rose v. Sims*, we think the present case may well be distinguished from it. In that case a special action was brought for not *indorsing* a bill of exchange according to an agreement; if the indorsement had been made, it would not in its nature necessarily have terminated in a *debt* from the defendants, for the acceptor would have been the debtor, the indorser a guarantee only.

Upon the whole, the demand appears to us to be a mere pecuniary demand, which the commissioners or assignees might have stated in account between the Defendant and the bankrupt; a demand which, although unliquidated at the moment, was capable of being reduced to certainty by a simple calculation, where no special damage had been incurred. This determination agrees with the principle adopted by the

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 GIBSON
v.
BELL.

1835. Judges of this Court in the case of *Sampson v. Burton (a)*,
 — and is not in conflict with the two cases on which the
 GIBSON Plaintiffs have principally relied; and certainly is more
 v. consistent with the principle and spirit of the bank-
 BELL. rupt laws.

For these reasons, we think there ought to be
 Judgment for the Defendant.

(a) 2 Brod. & Bing. 94.

May 18.

CURTIS v. SPITTY.

In debt for
 rent against
 an assignee,
 the Defend-
 ant traversed
 an averment
 in the de-
 claration, that
 all the estate
 in the pre-
 mises had
 vested in him.
 Issue having
 been joined,
 and the De-
 fendant hav-
 ing proved
 that he was
 assignee of
 part only of
 the premises,
 Held, that the
 verdict on
 such issue
 must be
 entered for
 the De-
 fendant.

THIS case was brought before the Court on a motion
 on the part of the Defendant by leave of the learned
 Judge who tried the cause, to enter a verdict for him
 upon the issue raised by the second plea to the first
 count of the declaration.

The first count of the declaration stated a demise by
 the Plaintiff's testator to one *William Copping*, for ninety-
 nine years, if certain persons should so long live, (some
 of whom were still in life), at the yearly rent of 18s.:
 that "on the 1st of *January* 1816, all the estate right,
 title and interest of the lessee of and in and to the
 said demised land and premises with the appurtenances,
 by assignment thereof, then and there made, came to and
 vested in the Defendant:" And that a certain sum be-
 came due to the lessor for rent of the premises after the
 assignment.

The second plea to this first count traversed the aver-
 ment, that all the estate, &c., came to and vested in the
 Defendant, in the very words of the declaration; and
 issue was joined upon that traverse.

At the trial, it appeared in evidence that in 1813, the premises comprised in the lease were divided into three separate parcels and put up to sale in three lots, by the executors of *Copping* the lessee; that the father of the Defendant purchased one of the parcels which was duly assigned to him for all the residue of the lessee's interest in the term; and that the interest in such parcel was now vested in the Defendant as his father's personal representative.

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v.
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Wilde Serjt. and *Petersdorff*, on behalf of the Plaintiff, shewed cause against the rule, which had been obtained chiefly on the authority of *Hare v. Cator* (a), where in a declaration against the defendant as assignee of *all the estate, &c.*, in certain premises, evidence that he was assignee of *part* only was held a fatal variance.

They contended that there must be some mistake in the report of that case; the lease there had never been assigned; the Defendant had purchased a fee; and therefore the Court could not have decided on the ground that *part* only of the premises had been assigned to the Defendant. But in *Merceron v. Dowson* (b), where in covenant against an assignee of a lease, the plaintiff declared that all the right, &c., of the lessee vested in the defendant by assignment, and that afterwards the premises were out of repair; and defendant pleaded in bar, that for one period he was possessed of one-sixth of the premises, as tenant in common with A., B., and C., and for another period of one-third, as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment; it was held, that the plea was bad in substance, as it could not be a bar to the whole action; and that it was bad in form also, as it merely confessed that defendant had pos-

(a) *Comp.* 766.

(b) 5 B. & C. 479.

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session of part of the premises, and not that he was assignee. In *Stevenson v. Lambard* (a), the assignee had been evicted from a moiety of the premises; but it was held, that that circumstance was no bar to an action of covenant for rent, though, if the defendant pleaded the eviction, the rent might be apportioned.

It thence followed that as, in the present case, the lessor had no means of ascertaining the precise share of the property assigned to the Defendant, the Defendant should have pleaded in abatement the non-joinder of the other assignees. 2 *Wms. Saund.* 142., *Com. Dig., Abatement, F. 12.* *Duppa v. Mayo* (b) has established that debt for arrears of a rent-charge ought regularly to be brought against *all* the perners of the profits of the lands liable; but if it be not, defendant can only take advantage of it by plea; and in *Mitchell v. Tarbutt* (c), Lord *Kenyon* said, "Where there is any dispute about the title to land, all the parties must be brought before the Court." It is true that covenant will lie against the assignee of part of an estate for not repairing his part; *Congham v. King* (d); but the verdict in this action would not be conclusive evidence in an action of covenant to charge the defendant with the repairs of the whole of the premises, for in answer to the action of covenant he might shew the special circumstances.

Thesiger and *Steer, contra.* If there be any mistake in the statement of the facts in *Hare v. Cator*, at least the judgment of the Court is exempt from ambiguity. The lessor has always his remedy for the whole rent by distress; and if he elects to charge an assignee in debt, he ought to ascertain beforehand the extent of the

(a) 2 *East*, 575.(b) 1 *Wms. Saund.* 282.(c) 5 *T. R.* 650.(d) *Cro. Car.* 221.

assignee's interest. *Congham v. King* (a), *Gamon v. Vernon* (b), *Twynnam v. Pickard*. (c)

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In *Stevenson v. Lambard*, the defendant had been assignee of the whole, but pleaded eviction of a moiety, and the case only decides that there may be an apportionment of rent. In *Merceron v. Dowson*, the defendant ~~was~~ assignee of the whole, with others, and the plea only went to a part of the declaration, though it professed to be an answer to the whole. In *Duppa v. Mayo* there was a rent-charge, which is not apportionable.

Cur. adv. vult.

TINDAL C. J. (after stating the pleadings and evidence as *antè*, p. 756.), proceeded:—

Whether upon this evidence, the Defendant is entitled to have the verdict entered for him upon the issue raised by the second plea, is the only question before us.

That the issue has been found for the Defendant in the precise terms in which it is raised, there can be no doubt; and if so, we feel difficulty in seeing upon what principle we can look further into the question intended to be raised between the parties in this stage of the proceedings; more particularly as the case of *Hare v. Cator* (d) is a direct authority upon the very point, that if the Plaintiff alleges in his declaration that the whole interest of the lessee came to him by assignment, and the Defendant traverses the allegation, it is a fatal variance, if it appears in the evidence that the Defendant was assignee of parcel only of the land originally demised. It must be admitted, that the observations made in the course of the argument upon that case, have excited some doubt as to the accuracy of the

(a) *Cro. Car.* 221.

(b) 2 *Lev.* 231.

(c) 2 *B. & Ald.* 105.

(d) *Cowp.* 766.

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report; but the argument of the counsel, and the judgment of the Court, preclude the possibility of doubt that the proposition with which the Court meant to deal, was this, that even if the defendant was assignee, he could be assignee of parcel of the land only, and that the plaintiff, having alleged in his declaration that he was assignee of the whole, was out of Court; and as that case has been regarded as law in *Westminster Hall* from the time of its decision down to the present day, we do not think ourselves authorised to overrule it, where the party who is to be affected by our determination has no opportunity of reviewing our decision.

The proposition contended for by the Plaintiff, is this; — that the lessor may charge the assignee of part of the land in *an action of debt* with the rent of the whole of the land comprised in the original demise. He may, undoubtedly, after an assignment of part, *distrain* upon that part for the rent which accrues due for the whole; because the rent for the whole becomes due out of each and every part of the land; but in that case it must be remembered, that the avowry would be for rent due from the original tenant, and nothing would appear upon the record as to the assignment. The remedy by distress, does not, therefore, afford any authority for the remedy by a direct *action of debt against* the assignee; which action, depending as it does upon the privity of contract being transferred to the assignee by reason of the privity of estate, that is, by reason of the Plaintiff being the landlord, and the Defendant the tenant of the same land, opens a very nice and difficult question, not settled by any decision in the books, so far as we can ascertain, namely, whether there exists a privity of estate in respect of the whole land by an assignment of part only.

If the proposition of the Plaintiff be the law, then the lessor would have had a good cause of action if he had

stated his title in the declaration according to the fact, and had rested his demand for the whole rent, upon the assignment to the Defendant of part only of the demised premises, and the question might then be raised upon the record by demurrer; or the Plaintiff might, by a special demurrer to the plea, have raised the same question; but he has thought proper to go to trial upon the issue tendered to him by the Defendant.

Under these circumstances, we think we are not justified in saying more on the present occasion than that we think the issue has been found against the Plaintiff; and, therefore, the verdict is to be found for the Defendant.

If another action is brought, either party may put the question on the record.

Rule absolute.

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HAWES and Others v. ARMSTRONG.

May 13.

ASSUMPSIT. The declaration stated, that before and at the time of the making of the promise and undertaking of the Defendant therein-after mentioned, *John Thomas Armstrong* and *Leonard Dell* were indebted to the Plaintiffs in a certain sum of money, to wit, the sum of 260*L.*, and being so indebted, the Plaintiffs were desirous and urgent to be paid the same; and thereupon, on the 13th of *May* 1829, in consideration that the Plaintiffs, at the instance and request of Defendant, would give time for the payment

" Inclosed I forward you the bills drawn per *J. A* upon, and accepted by *L. D.*, which I doubt not will meet due honour, but in default thereof I will see the same paid. *B. J. A.*:"

Held, that the consideration for *B. J. A.*'s promise did not appear sufficiently to render him liable on this undertaking.

1. B. & C. 159.
1. 763 A. 258.

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of the said debt or sum of 260*l.*, and would take, accept, and receive, by way of security for the payment of the same, three several bills of exchange (amounting in the whole to 260*l.*), respectively drawn by the said *J. T. Armstrong* upon and accepted by the said *L. Dell*, and respectively bearing date the 8th of *May* 1829; and would forbear and give to the said *J. T. Armstrong* and *L. Dell* time for payment of the said debt or sum of 260*l.* until the said bills should respectively become due and payable, the Defendant undertook and then promised the Plaintiffs, that in default of the said bills not meeting due honour, he would see the same paid. And the Plaintiffs averred, that they, confiding in the said promise and undertaking of the Defendant so made as aforesaid, did then, to wit, on, &c., take, accept, and receive, by way of security for the payment of the said debt or sum of 260*l.*, the said three bills so drawn and accepted as aforesaid, and did forbear and give time to the said *J. T. Armstrong* and *L. Dell* for payment of the said debt or sum of 260*l.* until the said bills respectively became due and payable according to the tenor and effect thereof: That although the said three bills had long since respectively become due and payable, and although the same were respectively duly presented to the said *L. Dell* for payment thereof when the same respectively became due and payable according to the tenor and effect thereof, and although the said *L. Dell* did not nor would, nor did nor would the said *J. T. Armstrong* duly honour the said several bills, or any of them, or pay the monies therein respectively mentioned, or any part thereof, when they were so presented for payment as aforesaid, or at any other time, of all which premises the Defendant had due notice; and although the Defendant was afterwards, to wit, on the 11th of *May* 1830, and often afterwards, requested by the

Plaintiffs to see the said several bills paid according to the form and effect of his promise and undertaking aforesaid; yet the Defendant, not regarding his said promise and undertaking in that behalf, did not, nor would, see the said several bills, or any of them, paid; nor had he paid the monies mentioned in the said three several bills of exchange, or either of them, or any part thereof, but had hitherto wholly neglected and refused so to do; and the said debt or sum of 260*l.* was still wholly due, unpaid and unsatisfied: to the Plaintiffs' damage of 300*l.*

Plea, that there was not any memorandum or note in writing signed by Defendant, or by any person by him thereunto lawfully authorised, of the said supposed promise and undertaking in the declaration mentioned; or of any promise or undertaking of or by the Defendant to answer for the said debt or default in the declaration mentioned, or any debt or default of the said *J. T. Armstrong* and *L. Dell*, or either of them, or otherwise, as required by the statute in such case made and provided, to charge the Defendant for such debt or default.

Replication, that there was, and still is, a certain memorandum or note in writing, made and signed by the Defendant, of the said promise and undertaking in the declaration mentioned, thereby charging himself with the said debt and default of the said *J. T. Armstrong* and *L. Dell*, and which said note or memorandum was addressed to the plaintiffs, in the words following; that is to say, — “Messrs. *Hawes*,—Gentlemen, inclosed I forward you the bills drawn *per J. T. Armstrong* upon and accepted by *Leonard Dell*, which I doubt not will meet due honour; but in default thereof, I will see the same paid. I remain, &c. *B. J. Armstrong, Hatton Wall, 13th May 1829;*” as by the said writing will more fully appear.

Demurrer and Joinder.

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R. V. Richards, in support of the demurrer, contended that the memorandum set out on the replication disclosed no consideration for the Defendant's promise; and therefore could not support the Plaintiffs' demand. *Wain v. Warters* (a), *Saunders v. Wakefield* (b), *Jenkins v. Reynolds* (c), *Morley v. Boothby* (d), *Lees v. Whitcomb* (e), *Cole v. Dyer* (g), *James v. Williams*. (h) At all events, it did not disclose the consideration alleged in the declaration, and therefore was either nugatory, or a departure. *Lysaght v. Walker*. (i)

Comyn, contra. The memorandum is sufficient, if it shews by reasonable inference the consideration alleged in the declaration: precise expression is not essential to its validity. *Morris v. Stacy* (k), *Boehm v. Campbell* (l), *Newbury v. Armstrong* (m), *Shortrede v. Cheek*. (n) The cases cited for the Defendant were cases of naked promise: here the memorandum expressly refers to bills in respect of which the Plaintiffs had a claim, and it must be presumed they were given on good consideration.

R. V. Richards. The memorandum does not disclose, as the declaration alleges, that the Plaintiffs had given time to the parties liable on the bills; that he had incurred any inconvenience at the request of the Defendant; or that the Defendant had obtained any advantage at the hands of the Plaintiffs.

Cur. adv. vult.

TINDAL C. J. The question which has been argued before us on these pleadings is this,—Whether the

- (a) 5 *East*, 10.
- (b) 4 *B. & Ald.* 595.
- (c) 3 *B. & B.* 14.
- (d) 3 *Bingh.* 107.
- (e) 5 *Bingh.* 84.
- (g) 1 *Cr. & Jer.* 461.

- (h) 2 *Dowl. Pr. C.* 481.
- (i) 5 *Bligh*, 2.
- (k) *Holt, N. P. C.* 153.
- (l) 8 *Taunt.* 678.
- (m) 6 *Bingh.* 201.
- (n) 1 *Adol. & Ell.* 57.

consideration which is stated in the declaration as the ground of the Defendant's promise, appears upon the memorandum or note in writing, signed by the Defendant, which is set forth in the replication. That, in order to satisfy the provisions of the statute of frauds, the consideration upon which the promise is made must appear on the written memorandum on which the action is brought, as well as the promise itself, has been settled by the authority of numerous decisions, of which the first is that of *Wain v. Warlters* (a): the ground of such decision being simply this,—that the term *agreement* used in the statute, includes both the consideration for the promise, and the promise itself. The consideration is thus stated in the declaration in the present case: “that the Plaintiffs, at the request of the Defendant, would give time for the payment of the debt of 260*l.* then due from *John Thomas Armstrong* and *Dell*, and would take, accept, and receive, by way of security for the payment of the same, the several bills of exchange set out in the declaration, and would forbear and give time to the said *John Thomas Armstrong* and *Dell* for payment of the said debt or sum of 260*l.* until the said bills should respectively become due and payable.” And whether this consideration sufficiently appears in the written memorandum, is the point in dispute.

That such consideration does not appear expressly, and in terms, in such memorandum, is apparent on the bare inspection of the writing itself. It is not, however, necessary that such consideration should appear in *express terms*: it would undoubtedly be sufficient in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. Not that a mere

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conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute : but there must be a well grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise.

Now, looking at the memorandum in this case, and reading it as persons of ordinary understanding would read it, we cannot come to the conclusion, that giving time, and forbearance to sue, was necessarily the consideration for the promise of the Defendant. It may have been so, undoubtedly, and most probably it was. But the consideration may also have been, for any thing to the contrary to be collected from the written agreement, an engagement on the part of the Plaintiffs to extend their credit to *Armstrong* and *Dell*; or an engagement by the Plaintiffs to discount these bills for *Armstrong* and *Dell*. For there is nothing whatever in the letter itself that necessarily connects the undertaking of the Defendant with the consideration of forbearance: no expression to denote that the bills are delivered in satisfaction of or as security for the debt then due from *Armstrong* and *Dell* to the Plaintiffs; not even any mention that any debt was due to them. Undoubtedly, it is extremely probable, from the amount of the debt due from *Armstrong* and *Dell* agreeing exactly with the amount of the bills inclosed in the letter, that such bills were sent as a security for the debt then due, and if so, that the forbearance for the time the bills had to run must have formed the ground for the promise of the Defendant; but there is no written evidence to show that such was the case: and after proof of the existence of such debt by parol evidence (which might be admitted) the great link in the chain of the evidence would

still be wanting, and there would be nothing but parol evidence to supply it, namely, that the forbearance of suing for that debt was the consideration for the particular promise.

Thinking, therefore, in this case, that the consideration for the Defendant's promise is left in complete uncertainty upon the Defendant's letter, we cannot bring ourselves to the conclusion that the memorandum is sufficient to take the case out of the statute of frauds; and consequently we hold that there must be

Judgment for the Defendant. (a)

(a) In *Ellis v. Levi*, (decided June 9th in the ensuing Trinity term,) the Court pronounced a like judgment on the following agreement:—

“Mr. T. Ellis, 60. White-chapel,—Mr. Richard H. Chase, of the office of Ordnance, Barbadoes, about to proceed thither in the *Mary*, having incurred an account with you, amounting

to 49l. 5s., with the understanding that he is to transmit the amount to you three months after he shall have arrived at Barbadoes, we hereby guarantee his performance of the said engagement; and in failure thereof we will be responsible to you. Isaac Levi & Co., 36. Old Broad Street, 20th Nov. 1833.”

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RAND v. VAUGHAN and Another.

May 13.

THIS was an action of trespass against the Defendants, in bar of which, they both pleaded a joint plea of Not guilty; and the Defendant *Duffield* then pleaded specially, as bailiff of *Vaughan* the landlord, a justification for a distress under the 11 G. 2. c. 19. s. 1.: the plea stating that the rent for which the distress was

A landlord cannot distrain under 11 G. 2. c. 19. s. 1., goods fraudulently and clandestinely removed from

the tenant's premises before the rent becomes due.

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made, became due on the 25th of *March* 1834; that the goods of the Plaintiff were fraudulently and clandestinely conveyed away to prevent the distress; and that the distress was taken within thirty days next ensuing such carrying away of the goods.

The Plaintiff, in his replication, alleged that the goods were conveyed away on the 24th of *March* 1834, before the time when the rent became due and payable; and the Defendant *Duffield*, in his rejoinder, took issue on that allegation.

The jury found a verdict for the Defendant *Vaughan*, on the plea of Not guilty; and for the Plaintiff, upon both the pleas of the Defendant *Duffield*, with 10*l.* damages.

Platt moved to enter judgment for the Defendant *Duffield*, *non obstante veredicto*, on the ground that, admitting the fact alleged in the replication, enough remained uncontroverted on the plea, to bar the Plaintiff's recovery. If tenants could elude a distress by removing their goods the day before rent became due, the statutes of 8 *Ann. c.* 13. s. 2. and 11 *G. 2.*, which enabled landlords to seize, for rent in arrear, goods clandestinely removed, would have been passed in vain: and though *Eyre C. J.*, in *Watson v. Main* (a), thought those statutes did not apply to the case of a removal before the rent became due, Lord *Ellenborough*, in *Furneaux v. Fotherby* (b), doubted the correctness of that opinion. A rule *nisi* having been granted,

Henderson shewed cause. Although judgment is sometimes entered for a Plaintiff *non obstante veredicto*, where a verdict has passed in favour of a Defendant, there is no instance of an application like the present, where the verdict has been found for the Plaintiff upon an issue

(a) 3 *Esp.* 15.

(b) 4 *Campb.* 136.

taken by the Defendant. But the statutes of 8 *Ann.* and 11 *G. 2.* apply only to the case of a removal of goods after rent is in arrear; and the decision of *Eyre C. J.* has never been overruled.

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Platt was heard in support of the rule.

Cur. adv. vult.

TINDAL C. J. (after stating the pleadings and finding of the jury, as *antè*, page 767.) said, This case comes before us on a motion to enter a verdict for the Defendant *Duffield*, *non obstante veredicto*. The motion would perhaps have been more correct in point of form, if it had been a motion to arrest the judgment for the Plaintiff, on the ground that enough still remains upon the Defendant's special plea confessed by the Plaintiff's replication, to bar the Plaintiff's demand: for we are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favour, *non obstante*. But we think there is no ground whatever for the motion in the one form or the other. The short question raised by the pleadings is, whether the statute applies to cases where the tenant removes his goods fraudulently and clandestinely before the rent becomes due; and we are of opinion that such case is not provided for by the statute. By the common law, the distress for rent was necessarily made upon some part of the demised premises, otherwise the tenant might rescue the distress, or bring an action of trespass. And it was only in case the landlord coming to distrain saw the cattle on the premises, and the tenant to prevent the distress drove them off the premises, that the landlord could justify freshly following and distraining them. And the statutes 8 *Ann. c. 14. s. 2.* and 11 *G. 2.* appear to have been passed with the view of

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removing such difficulty in the way of the landlord's remedy in the case of a fraudulent or clandestine removal of the tenant's goods off the premises. For it expressly empowers the landlord "to take and seize such goods, wherever the same shall be found, as a distress for the said *arrear of rent*; and the same to sell and otherwise dispose of in such manner as if the said goods *had been actually distrained by such landlord in and upon such premises for such arrears of rent.*" It is the *place*, therefore, not the *time* of the distress, to which the statute intends to apply the remedy: and, indeed, it is obvious, that if the construction contended for by the Defendant is adopted, as the landlord may, after five days next after the distress, sell the goods and pay himself the rent, he might do so in many cases before the rent became due, which never could have been intended. Looking to the intention of the act therefore, and the great uncertainty which would arise if a removal of the goods at any time before the rent became due would be sufficient to let in the provisions of the act; for if at any time, how long before, would be the question; we think the present distress was illegal. We therefore think the law to have been correctly laid down by *Eyre C. J.*, in *Watson v. Main (a)*, upon which Lord *Ellenborough* appeared to have doubted only, but to have expressed no opinion, in 3 *Campb.* 136.

Rule discharged.

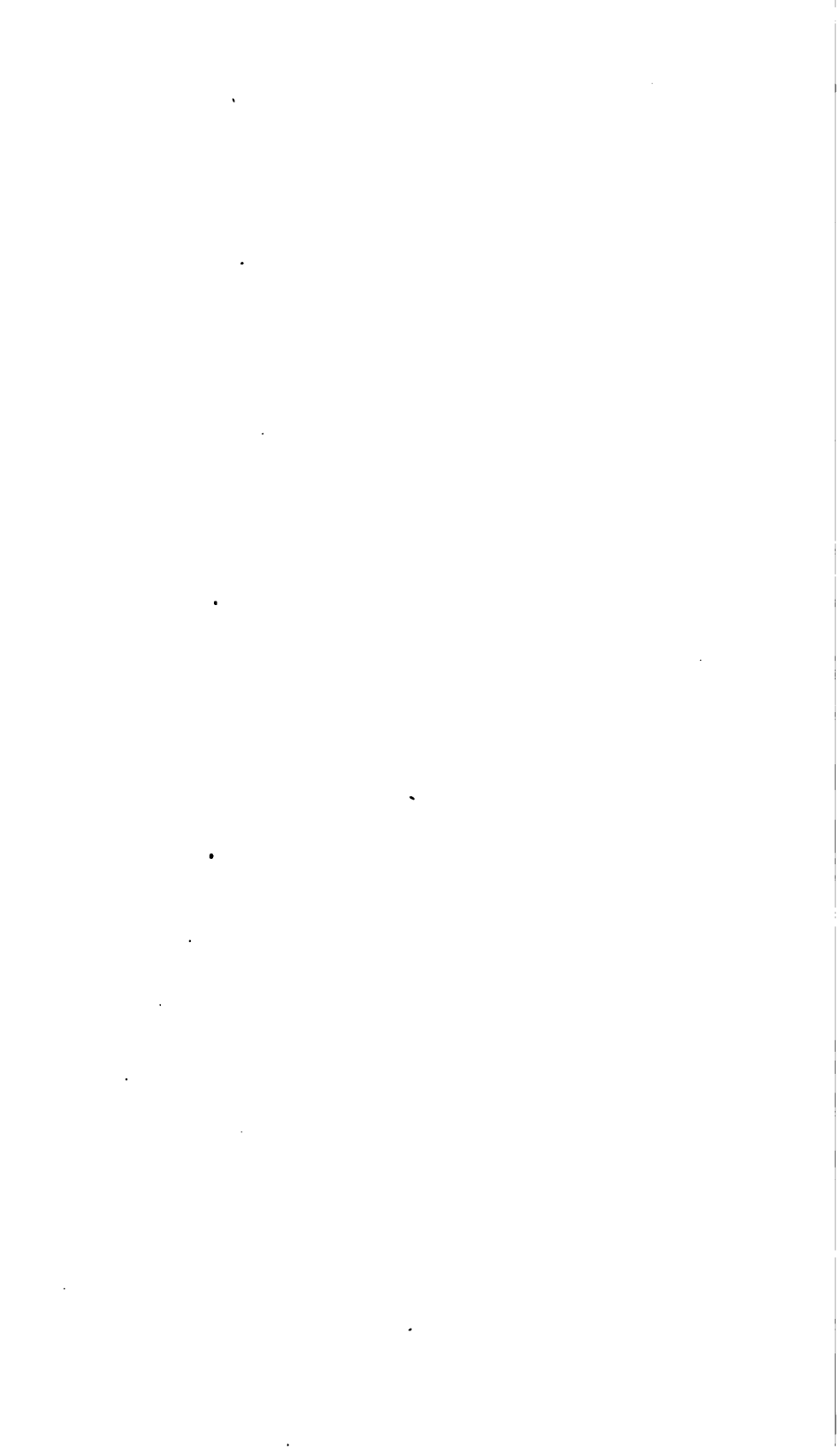
(a) 3 *Esp. N. P.* 15.

END OF EASTER TERM.

MEMORANDA.

On the 23d of *April*, the Great Seal was put in Commission. The Commissioners appointed were the Right Honourable Sir *C. C. Pepys*, Master of the Rolls, the Right Honourable Sir *L. Shadwell*, Vice-Chancellor, and the Right Honourable Sir *J. B. Bosanquet*, one of the Judges of the Court of Common Pleas.

Robert Alexander and *Thomas Starkie*, of *Lincoln's Inn*, Esquires, having, in the vacation preceding this Term, been appointed His Majesty's Counsel learned in the law, were, on the first day of Term, called within the bar, and took their seats accordingly.



AN
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TO
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CONTAINED IN THIS VOLUME.

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**AFFIDAVIT TO HOLD TO
BAIL.**

See PRACTICE, 19.

Affidavit to hold to bail for 50*l*. due for money paid and expended to the use of Defendant, and at his request agreed to be paid thereon: Held sufficient. *Hutchinson v. Hargrave*. Page 369

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See AWARD.

ASSAULT AND BATTERY.

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ASSIGNMENT.

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ASSUMPSIT.

1. The declaration stated, that in consideration Plaintiff, at the request of Defendant, had given Defendant a letter written by O., since deceased, by means of which

letter Defendant was enabled to, and did determine controversies, and obtain a large portion of O.'s effects, Defendant promised to give Plaintiff 1000*l.*: Held, that a sufficient consideration was disclosed to sustain an action on the promise. *Wilkinson v. Oliveira.*

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2. Plaintiffs in *London*, sold to Defendants a quantity of butter, which they expected from *Sligo*; the quality and price were specified in the contract. The butter was to be shipped for *London* in *October*, and to be paid for by bill at two months from the date of landing. The butter was not shipped till *November*, but the Defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck, Held, that Plaintiffs might recover the price from Defendants in an action for goods bargained and sold. *Alexander and Another v. Gardner and Another.*

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ATTACHMENT.

See COSTS, 12.

ATTORNEY.

See COSTS, 2. 5. 10. 12. 14. PRACTICE, 19.

1. Defendant, on being sued, paid the debt, but refused to pay costs; Plaintiff's attorney proceeded to trial and issued execution for them; but being uncertificated, and the Plaintiff having made him no advances, the Court stayed the proceedings. *Meeking v. Whalley.* 59

BAIL.

2. A charge for searching for judgments, will not render an attorney's bill taxable under 2 G. 2. c. 23. *Ex parte Bowles's Trustees.*

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3. An attorney having through inadvertence omitted to inscribe his name on the roll of attorneys, although he had observed every other formality necessary for his admittance, the court refused to enter it *nunc pro tunc* to defeat an action for penalties incurred by the omission. *Ex parte Swift.* 734

AVERAGE.

See INSURANCE.

AWARD.

- An arbitrator, who had authority to decide on what terms a partnership agreement should be cancelled, directed, among other things, that the agreement should be cancelled; that one of the partners should have all the debts due to the firm; and should, if necessary, sue for them in the name of his late partner: Held, that in authorising one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority. *Burton v. Wigley.*

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BAIL.

1. An affidavit in justification of bail, omitting to disclose their residence, is insufficient, notwithstanding the Plaintiff does not appear to oppose. *Welsh v. Lywood.* 258
2. The Defendant having been committed to the King's Bench prison

by a Court of Bankruptcy, this Court gave the bail time to render, notwithstanding the committal was under a *London* commission of bankrupt, and the bail had justified after the bankruptcy, after judgment, and at the request of the Defendant's attorney. *Waugh v. Ashford.* Page 294

3. The Court will not exonerate bail for a variance between the declaration and affidavit of debt, where they have consented to a stay of execution, and apply late for relief. *Coppin v. Potter.* 443

BAILBOND.

See PRACTICE, 15.

BANKRUPT.

See EVIDENCE, 7.

1. Plaintiff being liable to the Defendant for the costs of a nonsuit, issued a *fiat* of bankruptcy against the Defendant. The Court refused to stay Defendant's proceedings in the action. *Eicke v. Nokes.* 69
2. A coal-merchant, at the time of his bankruptcy, had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act. These barges he had hired of Defendant, it being the custom for coal merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal-merchant's assignees under his bankruptcy, Held, that it was properly left to the jury to find whether the

custom to hire was generally no to rious in the coal trade; and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large. *Watson and Another, assignees of Devey, a bankrupt, v. Peache.* Page 327

3. A bill of exchange for a portion of his debt, given by a bankrupt after commission and before certificate to his assignee, who was also petitioning creditor, and had proved for the residue of his debt, Held void in the hands of the assignee. *Rose v. Main.* 357
4. Defendant, after he had become bankrupt, was discharged out of custody on a *ca. sa.* upon executing a warrant of attorney with two sureties, the sureties consenting that the Plaintiff, in order to lessen their liability, should prove his debt under the commission.

The Plaintiff having proved his debt, but no dividend having been paid, the Court refused on a summary application to exonerate the sureties. *Duncan v. Sutton and Others.* 431

5. Defendants, *B.*'s bankers, had discounted for *B.* a bill payable *January* 10th, drawn by *B.*, and guaranteed by *L.*

On the 3d of *January*, *B.*, being in embarrassed circumstances, gave *L.* a cheque on Defendants for the amount of the bill: the Defendants on receiving the cheque handed the bill over to *L.* — *B.* became bankrupt *January* 9th:

Held, that his assignees could not sue Defendants as having re-

ceived the amount of the cheque by way of fraudulent preference. *Abbott and others, assignees of Baker, a bankrupt, v. Pomfret and others.* Page 462

6. In trespass, Defendants, after alleging that *M.* had been declared a bankrupt, and that they had been appointed his assignees, justified taking goods as belonging to them in their capacity of assignees: Plaintiff replied that the goods belonged to him, and not to Defendants: Held, that upon this issue it was not incumbent on Defendants to give formal proof of *M.*'s bankruptcy and their appointment as assignees. *Jones v. Brown and others.* 484

7. To an action by the assignees of a bankrupt ship owner for the freight of a voyage to *India* accruing to him before his bankruptcy, the Defendant pleaded, that the ship-owner before his bankruptcy assigned by deed the freight in question to *I.*, in trust to discharge a debt due from the ship owner to *I.*, and to pay the surplus, if any, to the ship owner; that the Defendant had notice of such assignment, and that the freight, which was not sufficient to discharge the debt, had been demanded of him by *I.*: Held, a good bar to the action. *Leslie and Others, assignees of Cumberlege, the younger, a Bankrupt, v. Guthrie.* 697

BARON AND FEME.

See FEME COVERT.

1. To plea of coverture, Replication,

BILL OF EXCHANGE.

that the husband was an alien, not a subject of this country by naturalisation or otherwise, and at the time of the contract residing in *France*, that the Defendant lived in this kingdom, separate from her husband, that the Plaintiff gave no credit to her husband, but contracted with her as a feme sole, Held ill. *Stretton v. Busnach.* Page 139

2. Plaintiff declared that he executed a separation deed between himself and his wife, and agreed to pay certain debts due to *G.* and *R.*, and certain household expenses at *H.* in full, confiding in an agreement by the Defendant to pay him a certain sum towards the discharge of the said debts and expenses, and to enlarge the time mentioned in the deed of separation, for Plaintiff's quitting the house at *H.*, but that the Defendant did not pay the sum agreed on. Plea, that Plaintiff was solely liable to pay the debts due to *G.* and *R.*, and the household expenses in full, the agreement to pay part of which was stated to be the consideration for the Defendant's promise. Held, that the plea was ill, and the declaration sufficient. *Waite v. Jones.* 656

BILL OF EXCHANGE.

See PLEADING, 4. 11. TROVER. EVIDENCE, 10. BANKRUPT, 3.

1. By the law of *France*, an indorsement in blank does not transfer any property in a bill of exchange: Held, that the holder of a bill drawn in *France*, and indorsed

there in blank cannot recover against the acceptor in the courts of this country. *Trimbey v. Vignier*. Page 151

2. A letter from the holder to the indorser of a bill, threatening legal measures unless the bill be paid, does not amount to notice of dishonour of the bill by the acceptor. *Solarte and Others v. Palmer and Another*. 194
3. A party who, being employed by Plaintiff to procure a bill of exchange to be discounted, lodged it instead with Defendant as a security for a debt due to Defendant, was held a competent witness for Plaintiff in an action of trover brought by Plaintiff for the recovery of the bill.
4. To trover for a bill of exchange, Defendant pleaded that the drawer being lawfully possessed of the bill, indorsed it to P., and that P., for good consideration, indorsed it to Defendant: Plaintiff replied, that there was no good consideration for P.'s indorsing the bill. The jury having found for the Plaintiff on this replication, the Court refused to arrest judgment or award a repleader. *Fancourt v. Bull*. 681

BREWER.

See COVENANT, 2. PLEADING, 5.

CAPIAS.

See PRACTICE, 8.

CHARTER - PARTY, CONSTRUCTION OF.

1. Defendant by charter-party of October 20th 1832, agreed to go in ballast from *Portsmouth* to *St. Michael's*, and bring back a cargo of fruit direct to *London*. The charterer was to be allowed thirty-six running days for loading and unloading, to commence on the 1st *December* then next; and if the vessel did not arrive at *St. Michael's* by the 31st of *January* 1833, the charterer was to be at liberty to rescind the charter-party:
Held, that the Defendant was bound to proceed at once to *St. Michael's*, and was not at liberty to make an intermediate voyage for his own purposes although, notwithstanding such intermediate voyage, he arrived at *St. Michael's* before the 31st of *January* 1833. *M'Andrew v. Adam*. Page 29
2. Agreement to proceed to the *East Indies*, and there load a full and complete cargo; the fore-cabin to be filled with light goods; freight 4l. 15s. per ton of 20 cwt. for sugar, coffee, and rice, and for pepper at 18 cwt. to the ton; 100 tons of rice or sugar to be shipped previous to any other part of the loading, to ballast the vessel: Held, that the owner was obliged to furnish what further ballast was necessary, and that the freighter, after shipping the 100 tons of sugar, was at liberty to complete the cargo with light goods. *Irving v. Clegg and Another*. 53
3. Plaintiffs agreed with Defendants

to convey a cargo to *Oporto*, and if the river was in possession of an enemy, to unload at *F.*, outside the harbour. The freight was to be 475*l.*; or, if the vessel could enter *Oporto*, discharge and reload there, 300*l.* only; twenty-five days were allowed for unloading. Plaintiffs arrived at *F.* June the 2d, and an enemy being in possession of the river, commenced unloading there. The vessel was detained at *F.*, partly for the convenience of Defendants, and partly by bad weather, till August 25th, and by that time had discharged seven eighths of her cargo. The enemy then having quitted the river, she entered *Oporto*, where she discharged the remaining eighth of her cargo. In July, the Defendants' agent at *Oporto* gave Plaintiffs a bill for the larger freight. In September the vessel obtained, at *Oporto*, a full cargo for England. Held, that Plaintiffs were entitled to the larger freight, and to demurrage from the 28th of June. *Gibbens and Others v. Buisson and Another.* Page 283

COMMON.

By a local act all rights of common whatever in *B.* were extinguished; the wastes were divided; the owners of allotments were directed to inclose, and authorised to distrain the cattle of strangers trespassing:

No fence having been made, held, that the owner of an allotment in *B.*, could not distrain cattle which had strayed into his allotment from a common in *W.*,

in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of *W.* *Wells v. Percy.* Page 556

COMPOSITION DEED.

A composition with a clergyman, in consideration that his future income may be received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under 13 *Eliz. c. 20.* *Alchin v. Hopkins, Clerk.* 99

CONDITION.

See ESTATE, 1. ROYAL SIGN-MANUAL.

CONSIDERATION.

See ASSUMPSIT, 1. EXECUTION, 1. PLEADING, 16.

CONTRACT.

See EXECUTOR, 1.

CONVEYANCE.

See ESTATE, 2.

COPYHOLD.

The copyhold property of an insolvent debtor vests in his assignee by virtue of the assignment under 7 *G. 4. c. 57. s. 11.* without entry on the court rolls. *Doe dem. Smith, v. Glenfield.* 729

COPY RIGHT.

See PLEADING, 17.

CORPORATION.

Where the crown granted a borough in fee-farm to a corporation, and acquitted them of part of the rent,

willing that they should repair the banks, mounds, sea-shores, and pier within the borough: Held, that an action lay against the corporation at the suit of an individual, whose house had been injured by the sea in consequence of the neglect of the corporation to repair the sea-shore and mounds. *The Mayor and Burgesses of Lyme Regis v. Henley.* Page 222

COSTS.

See ATTORNEY, 2. PRACTICE, 14.

1. The tenant in a real action is not entitled to costs upon a *nolle prosequi*. *Williams v. Harris.* 13
2. The book of the clerk of the warrants is the proper place of enrolment for the name of an attorney of the Common Pleas. It is the duty of the attorney to cause his name to be enrolled; and if he omits to do so, he is incompetent to obtain costs, though otherwise duly qualified as an attorney. *Humphreys v. Harvey.* 62
3. If a rule is drawn up in the alternative, the party who fails on the substantial question is not entitled to the costs of the rule, although he succeeds upon the alternative. *McAndrew v. Adam.* 270
4. Where an executrix commenced an action with temerity, and prosecuted it recklessly, laying the venue in *Middlesex*, notwithstanding all the parties lived in *Monmouthshire*, and twice violating a peremptory undertaking to try, the Court refused to exonerate her from costs. *Wilkinson, Executrix of Bevan, v. Edwards.* 301
5. When one judgment is set off against another, the lien of an attorney does not extend beyond his costs in the particular cause. *Watson v. Maskell.* Page 366
6. Where, upon a matter decided at chambers, a judge has entertained the question of costs, an appeal to the Court on the subject of such costs ought not to be made. *Davy v. Brown.* 460
7. Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser cannot recover as damages, expenses incurred previously to entering into the contract; nor the expense of a survey of the estate; nor the expense of a conveyance drawn in anticipation of a completion of the purchase; nor the extra costs of a chancery suit touching the purchase, in which the vendor is defeated; nor losses sustained by the purchaser, in the resale of stock prepared for the estate. But he is intitled to recover the expense of comparing deeds, of searching for judgments, and of journies for that purpose; and interest on his deposit money. *Hodges v. Earl of Litchfield.* 492
8. A policeman Defendant who obtains a verdict is entitled to his costs under 10 G. 4. c. 44., notwithstanding the power given to the Judge to certify under 3 & 4 W. 4. c. 42. *Humphrey v. Wodehouse and Others.* 506
9. Costs of commission to examine witnesses abroad, not allowed to the party who obtains the commission,—although successful in the

action, — where the examination is more peculiarly for his benefit. *Bridges v. Fisher.* Page 510

10. Where a verdict was found against one of three Defendants, and in favour of the two, the Court deducted the costs of the two out of Plaintiff's costs and damages against the one, without regard to Plaintiff's attorney's lien. *George v. Elston and Others.*

513

11. The circumstance that an executor has commenced and conducted an action properly, is not sufficient to exempt him from costs, if he fails. *Southgate and Others, Executors of T. Clark, v. Crowley and Another.*

518

12. Where costs were ordered to be paid to the Defendants or their attorney, a demand by their attorney in the country was held sufficient to authorise an application for an attachment to enforce payment, notwithstanding the agent of the attorney in the country was the attorney on record. *Dennett v. Pass and Another.*

638

13. Upon a declaration of two counts, the Defendant paid into Court enough to cover the demand in the first, and obtained a verdict on the second; but having omitted to plead the payment, as required by the new rules, Held, that he was not entitled to costs. *Adlard v. Booth.*

693

14. Upon setting off one judgment against another, subject to the attorney's lien, that lien must be taxed as between attorney and client. *Watson v. Maskell.*

727

15. Defendant having being arrested for 65*l.*, when there was not probable cause for arresting him for more than 44*l.*, the Court allowed him his costs under 43 *G. 3. c. 46.* *Bradley v. Milnes.* Page 738

COVENANT.

See EXECUTOR.

1. Lessee for a term of years under-leased for a term longer than his own, the under-lessee covenanting to pay rent to lessee: Held, that the executor of lessee might sue the under lessee for rent accruing during the continuance of lessee's term. *Baker and Wife, Executrix of Hutchins, v. Gostling.*

19

2. Carrying on the business of a retail brewer, Held, to be no breach of a covenant not to carry on the business of a common brewer, or retailer of beer. *Simons and Battley v. Farren.*

126

3. Plaintiff and Defendants were members of a Joint Stock Company; Plaintiff agreed to demise land to Defendants as trustees for the Company; Defendants covenanted to pay him rent; and by a separate deed, Plaintiff and the other members of the Company covenanted to indemnify the Defendants for acts done by them as trustees: Held, that Plaintiff, notwithstanding he was a member of the Company, might sue Defendants on their covenant. *Bedford and Others, Assignees of Austin, a Bankrupt, v. Brutton and Others.*

399

DEVISE.

See RENT CHARGE. ESTATE 2.

1. Testator being seised in tail of lands at *C.*, with remainder to his son in tail, and reversion to himself in fee, and being seised in fee of other lands at *D.*, devised "all his real estates whatsoever, over which he had any disposing power," to *R.* and his heirs, in trust for testator's son for life, with several remainders over in tail, subject to terms for the payment of debts, annuities, and marriage portions: Held, that by this devise testator's reversionary interest in the lands at *C.* passed to the devisee. *Moslyn and Others v. Champneys and Others.* Page 341

2. *T. J. Selby*, who had no relations of his own name, devised his property to his right and lawful heir at law, (for whom he directed advertisements to be published,) charged with legacies to be paid in twelve months after testator's death; and if no heir was found, to *W. L.*, on condition he changed his name to *Selby*. On the side of his mother and grandmother, the testator had several relations, to whom he left large legacies: Held, that by his lawful heir he meant an heir of the blood of the *Selbys*; and that none such being found, the property belonged to *W. L. Davies and Wife, Demandants; Lowndes, Tenant.* 597

DISTRESS.

See LANDLORD AND TENANT, 2.
VOL. I.

DOWER.

See EVIDENCE, 2.

DURANTE VIDUITATE.

See ESTATE, 1.

ECCLESIASTICAL BENEFICE.

See COMPOSITION DEED.

ERROR.

See PRACTICE, 7.

ESTATE.

1. Rents devised to a female *durante viduitate*, do not pass over to the remainder-man upon her cohabiting with one who, under an illegal marriage, holds himself out as her husband. And the party who thus holds himself out is not, by so doing, estopped to shew the invalidity of the marriage. *Allen and Wife v. Wood, Administrator of Grimmett.* Page 8
2. Devise of land to trustees, in trust to permit testator's wife and daughters to receive the clear rents of three parts to their sole and separate use, and the testator's son the clear rent of the fourth part; the trustees to pay all outgoing, to repair and to let the premises: Held, that the legal estate, as to all the four parts, vested in the trustees.

Upon the death of one of two trustees, the survivor was to appoint another in place of the deceased, and to convey the premises to him, to hold them jointly with

the survivor. One of the trustees being dead, the survivor by a deed to which the *cestuique trusts* were parties, appointed *P.* sole trustee, in place of himself and the deceased, and conveyed the premises to *P.* to hold to him and his heirs, and not jointly with the surviving trustee: Held, that the whole legal estate passed by that conveyance to *P.* *White v. Parker.* Page 573

ESTOPPEL.

See LANDLORD AND TENANT, 1.
ESTATE, 1.

EVICTIION.

See PLEADING, 5.

EVIDENCE.

See BANKRUPT, 6. PLEADING, 15.
18, 19. BILL OF EXCHANGE, 3.
PRACTICE, 18.

1. Plaintiff, a leaseholder, in consideration of 100*l.*, and a yearly sum of 75*l.* payable quarterly, by indenture under-demised and leased to Defendant certain premises for a longer term than Plaintiff had in them himself: Held, that a counterpart of this indenture, executed by Defendant only, and bearing only a 30*s.* stamp, was not admissible in evidence to support an allegation of assignment, on which Defendant had taken issue. *Baker and Wife, Executrix of Hutchins, v. Gostling.* 246
2. In dower, the Tenant pleaded in May 1833, that Demandant had elected to receive an annuity in satisfaction of dower: Held, that

the plea was not supported by shewing the Demandant's receipt of dividend in September 1833.

Held also, that an order made in a suit in Chancery between the Demandant, Tenant, and others, was admissible in evidence for the Demandant in dower, to shew the circumstances under which the dividends were received. *M. Slater, widow, Demandant; G. Slater, Tenant.* Page 259

3. A memorandum signed by the lessee on the margin of a lease, and stating that the lessee was to be tenant and pay rent for a period of six weeks antecedent to the term granted by the lease, Held admissible in evidence on the part of the lessor, to shew the amount of rent due. *Cowne v. Garment.* 318
4. Plaintiff put up to sale by auction a lease of premises which he occupied as assignee of the lease, stipulating not to produce any title prior to the lease: In an action against a purchaser for not completing his purchase, in which action Plaintiff declared he was possessed of the lease, held, that he was bound to prove the execution of it, by calling the attesting witness, and that it was not sufficient to prove the assignment to Plaintiff. *Laythorpe v. Bryant.* 421
5. Statements of a deceased occupier touching his title are admissible in evidence generally, without reference to the particular effect they may produce in the cause. *Carré, Demandant; Nicol, Tenant.* 430
6. A conversation at the time of a

purchase is admissible in evidence for the Defendant, in an action for the price of the goods, although it may let in a set-off otherwise barred by the statute of limitations. *Moore v. Strong*. Page 441

7. A trader, in embarrassed circumstances, absented himself from his house from the 16th of *February* till the 9th of *March*. Upon an issue, whether he had committed an act of bankruptcy on or before the 5th of *March*, two letters written by him on the 16th of *January* preceding, asking for time on two bills of exchange payable by him in *February*, were received in evidence to shew the motive of his absence. *Smith and Another, Assignees of Whalley, a Bankrupt, v. Cramer*. 585

8. A defence, on the ground of want of consideration for an agreement, cannot be proved under the plea of *non-assumpsit*. *Passenger v. Brookes*. 587

9. On a trial touching the right to lands, decrees in Chancery between other parties, concerning the same lands, were held admissible in evidence, to shew the character in which the possessor enjoyed the lands. *Davies and Wife, Demandants; Lowndes, Tenant*. 607

10. An entry of the dishonour of a bill of exchange, made in the usual course of business, at the time of the dishonour, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry. *Poole v. Dicus*. 649

EXECUTION.

1. *M.* being in custody on execution, pursuant to a warrant of attorney, by which he had agreed that execution should issue from time to time for certain instalments of a mortgage debt, Defendant, in consideration that Plaintiff would discharge *M.* out of custody, undertook that he should, if necessary, be forthcoming for a second execution:

Held, that Defendant's was a valid contract. *Atkinson v. Bayntun*. Page 444

2. A sale of the goods of an insolvent under a *fi. fa.*, issued upon a warrant of attorney given by the insolvent, is invalid if it take place after the commencement of the insolvent's imprisonment, notwithstanding the goods may have been seized under the writ before the imprisonment. *Kelcey, Assignee of Fordred, an Insolvent, v. Minter and Another*. 721

EXECUTION DEED.

See *BARON AND FEME*, 2.

EXECUTOR AND ADMINISTRATOR.

See *COVENANT*, 1. *COSTS*, 4. 11.

Where an administrator has occupied premises demised to the intestate, it is no plea to an action of covenant to pay rent and taxes, and for non-repair, to say, that the premises yield no profit. *Tremeere v. Morison*. 89

FEME COVERT.

1. Under 3 & 4 W. 4. c. 74. ss. 77. 91. a feme covert, when her husband has absconded, and has not been heard of for some time, may pass a vested reversionary life interest in freehold property. *Ex parte Mary Gill*. Page 168
2. To a declaration on a bill of exchange alleged to have been drawn and indorsed by *Sarah Elwood*, Defendant pleaded that she was the wife of *Thomas Elwood*, who was still alive; replication that she drew and indorsed the bill by the authority of her husband: Held, no departure. *Prince v. Brunatte*. 435

FINE.

1. The Court refused to amend a fine in a case of misdescription cured by 3 & 4 W. 4. c. 74. s. 7. *Lockington, Demandant; Shipley and Wife, Conusors*. 355
2. Passing of fine after death of conusee. *Griffith's fine*. 720

FORGERY.

See MONEY HAD AND RECEIVED.

GUARANTY.

1. Plaintiffs, owners of a ship hired on charterparty by *H. S.*, refused to let her sail till certain disputes about the freight between them and *H. S.* were settled, by *H. S.* giving security: whereupon De-

fendant, in consideration that Plaintiffs would let *H. S.* sail without giving security, undertook to get *T. M.* to sign the guaranty hereunder set forth, and deliver it to Plaintiffs in a week: Held, that this was not an undertaking for the debt, default, or miscarriage of another, within the statute of frauds.

The guaranty to be signed by *T. M.* was as follows:—"Whereas, *H. S.* has hired your ship for six months from the 12th of *July*, 1830, and such longer time as his intended voyage may require, and has paid or secured the freight for six months, from the 20th of *August*, 1830, and is about to leave *England*, I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months:" Held, an undertaking within the statute of frauds, and insufficient for want of a consideration apparent on the face of it; and consequently that only nominal damages could be recovered against Defendant for failing to procure *T. M.*'s signature, according to his promise *Bushell and Others v. Beavan*.

Page 103

2. "Inclosed I forward you the bills drawn per *J. A.* upon, and accepted by *L. D.*, which I doubt not will meet due honour, but in default thereof I will see the same paid. *B. J. A.*"

Held, that the consideration for *B. J. A.*'s promise did not appear sufficiently to render him liable on

this undertaking. *Hawes and Others, v. Armstrong.* Page 761

GOODS BARGAINED AND SOLD.

See ASSUMPSIT, 2.

HOUSE OF LORDS.

See PRACTICE, 7.

INFANT.

1. The Court has no jurisdiction to discharge from custody an infant in execution for damages, in an action of slander. *Defries v. Davis.* 692
2. Defendant and an infant who had granted an annuity, covenanted jointly and severally for the due payment of the same: Held, that the infancy of the grantor did not avoid and exonerate the Defendant from his separate contract. *Gillow and Others, Executrix and Executors of Gillow, v. Sir John Scott Lillie.* 695

INSOLVENT DEBTOR.

See COPYHOLD. EXECUTION, 2.

Where no fraud has been committed, the assignment by an insolvent debtor to his provisional assignee under 7 G. 4. c. 57., passes only such property as the insolvent has at the time of the assignment. *Sims and Another, Assignees of Barnard, an Insolvent, v. Simpson.* 306

INSURANCE.

Hides insured from *Valparaiso* to *Bordeaux* free of particular average, unless the ship were stranded, arriving at *Rio de Janeiro* on their way to *Bordeaux*, in a state of incipient putridity occasioned by a leak in the ship, were sold for a fourth of their value at *Rio*. The ship was stranded on her passage from *Rio* to *Bordeaux*. The assured received the news of the damage of the hides and of their sale, at the same time:

Held, that the stranding was not such as to make the underwriter liable for an average loss; and that the assured could not recover as for a total loss, without abandonment. *Roux v. Salvador.* Page 526

INTERPLEADER.

See SHERIFF, 1. PRACTICE, 20.

JOINDER OF PARTIES.

See PLEADING, 20.

JOINT STOCK COMPANY.

See COVENANT, 3.

JUDGES.

The Judges declined to answer a question proposed to them by the House of Lords, in terms which rendered it doubtful whether it did not extend to the construction of a bill before the House. *In the matter of the London and Westminster Bank.* 197

JUDGMENT.

See PRACTICE, 1. 11, 12.

LANDLORD AND TENANT.

See NEW TRIAL. PLEADING, 1, 2.
STAMP.

1. The Plaintiff came into occupation under one who had paid rent upon distress by the Defendant: Held, that after proof of this fact, the Plaintiff was estopped to dispute the Defendant's title to the rent, notwithstanding the Defendant inadvertently put in evidence a document which shewed that the Plaintiff's predecessor occupied under a lease to which the Defendant was in law a stranger. *Cooper v. Blandy and Another.* Page 45
2. A landlord cannot distrain under 11 G. 2. c. 19. s. 1. goods fraudulently and clandestinely removed from the tenant's premises before the rent becomes due. *Rand v. Vaughan and Another.* 767

LEASE.

See STAMP.

LIEN.

See COSTS, 5. 10. 14.

MEMORANDA, 243. 571. 771.

MONEY HAD AND RECEIVED.

A stockholder whose stock has been sold without his knowledge under a forged power of attorney, may

PATENT RIGHT.

sustain an action for money had and received against the party who holds the proceeds of the sale. *Marsh and Others, Plaintiffs in Error, v. Keating, Defendant in Error.* Page 198

NEW TRIAL.

Plaintiff having recovered a verdict under 20*l.* as damages for his inability to let a house for six weeks in consequence of Defendant having omitted to do certain repairs to which he was liable as tenant, the Court refused to disturb the verdict, notwithstanding the substantial repairs were to be done by Plaintiff. *Woods v. Pope.* 467

NIL HABUIT IN TENEMENTIS.

See PLEADING, 1.

OUTLAWRY.

Outlawry, when an abuse of process. *Pigou v. Drummond.* 354

PATENT RIGHT.

In case for invading Plaintiff's patent right to certain machinery for drying calicoes, &c., where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same machinery; a jury having found that

the invention was new and useful on the whole, but that the machine was not useful in *some* cases for taking up goods, the Court refused to set aside the verdict for the Plaintiff and enter a nonsuit. *Ha-worth v. Hardcastle and Others.* Page 182

PARTNERS.

See COVENANT, 3.

PENAL ACTION.

See PLEADING, 21.

POLICE.

See COSTS, 8.

POST-HORSE DUTY.

By 4 G. 4. c. 62. postmasters are to pay for horses let out for a distance not exceeding eight miles, a duty of 1s. 9d. a horse, or one fifth of the sum charged to the hirer, and are to make a return to the stamp office of the number of horses let, the number of miles, the amount charged to the hirer, the fifth part of that amount, *or* 1s. 9d. for each horse. For a false return the postmaster is liable to a penalty; and the farmer of the duty may compel him to verify his return on oath. Defendant returned, as the amount of duty for two horses let out for five miles, 2s. 6d., and omitted to state the sum charged to the hirer:

Held, that notwithstanding such omission, he had sufficiently indicated his election to pay the duty of one fifth, and that the farmer could

not claim 1s. 9d. for each horse. *Hammond v. Hooley.* Page 131

PLEADING.

See PRACTICE, 9. SHERIFF, 2. EVIDENCE, 8. BARON AND FEME. BILL OF EXCHANGE, 4. COSTS, 13. BANKRUPT, 6, 7. FEME COVERT, 2. ASSUMPSIT, 2. MONEY HAD AND RECEIVED.

1. *Nil habuit in tenementis* is no plea in an action of debt for use and occupation. *Curtis and Others, Executors of Curtis, v. Spitty.* 15
2. In case for an irregular distress, it is necessary to state correctly to whom the rent distrained for is due; and a variance in this respect is fatal. *Ireland v. Johnson, Vaughan, and Others.* 162
3. A Defendant may plead to the same demand, first, the general issue; and, secondly, that the demand accrued for carrying into effect illegal wagers. *Triebnerr v. Duerr.* 266
4. To a declaration by indorsee against acceptor, Defendant pleaded that the bill was accepted without consideration from the drawer: Held ill, and that under the rule of *Hil. 4 W. 4.* Plaintiff might demur. *Low v. Chifney.* 267
5. To covenant for rent, plea that Defendant, with the consent of lessor, carried on the business of a retail brewer and retailer of beer, whereupon a forfeiture was incurred, and he was evicted by *B. C.* having good right and title to the premises as heir of *C.*, with

whom Defendant's lessor had covenanted not to carry on the business of a retailer of beer without the consent of C.: Held ill. *Simons and Another v. Farren*.

Page 272

6. A plea of privilege, as attorney of another court, is a plea in abatement; and if it be not verified by affidavit, Plaintiff may sign judgment. *Davidson v. Chilman*. 297
7. The rule of *Hil. 4 W. 4.*, which requires the party who pleads a plea of judgment recovered to set out its date, &c. in the margin of the plea, does not apply to a plea of judgment recovered against an executor.

Barristers under the degree of the Coif are, as well as Serjeants, competent to sign pleas in the Court of Common Pleas. *Power v. Izod, Administrator of Izod*. 304

8. To action on an attorney's bill, Defendant pleaded that the bill was for work at law and in equity, and was not delivered to her a month before action. Replication, that the bill was not for work at law and in equity: Held, ill. *Moore v. Boulcott*. 323
9. The Court allowed the assignees of a bankrupt to plead, in covenant on a lease, 1st, that the lessee's interest did not pass to them; 2dly, that they renounced the term in time to be discharged from the performance of covenants. *Thompson v. Bradbury and Another, Assignees of Venables, a Bankrupt* 326
10. To a declaration of two counts, one on a bill of exchange, the other

on an account stated, Defendant, without a rule to plead several matters, pleaded, "that he did not accept the bill; and for a further plea, that he did not account:" Held, that the informality of omitting to confine each plea to the count to which it applied did not authorise Plaintiff to sign judgment. *Vere v. Goldsborough*.

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11. To a plea by the acceptor of a bill of exchange, that it was, to the knowledge of the holder, negotiated by fraud, and that no consideration was given for the indorsement to the holder, it is sufficient for the holder to reply generally, that he had no notice of the fraud, and that the bill was indorsed to him for a good consideration. 469
12. And where upon demurrer judgment was given for Plaintiff on such a replication, the Court refused to allow Defendant to withdraw the demurrer on payment of costs. *Bramah and Another v. Roberts and Others*. 481
13. To a plea of payment of 3*l.* 8*s.* 2*d.* in satisfaction and discharge of Defendant's promise; replication that Defendant did not pay it in satisfaction and discharge, nor did Plaintiff receive it in satisfaction and discharge: Held, on demurrer, unobjectionable. *Webb, Assignee of Walter, an Insolvent, v. Weatherby*. 502
14. Pleas in trover. *Leuckart v. Cooper and Another*. 509
15. Plaintiff declared, that he was

- possessed of a close and pond; that Defendant at the time of the grievance complained of was possessed of a close used as a private road, adjoining Plaintiff's close and pond; and that Defendant wrongfully made in his said close used as a private road a sewer near to the Plaintiff's pond, and continued the sewer for a long time, and thereby during all that time diverted the water of the pond: Held, that the allegation that the Defendant's close was used as a private road at the time of making the sewer was surplusage, which it was not incumbent on the Plaintiff to establish in proof. *Dukes v. Gostling.* Page 588
16. Illegality of consideration must be pleaded specially as a defence, not only where the express contract on which a Plaintiff sues is illegal, but also where illegal services having been performed, no contract to pay for them can be implied. *Potts v. Sparrow.* 594
17. In *assumpsit* for the price of a copyright bargained and sold, a defence on the ground that the copyright was not assigned in writing, must be specially pleaded. *Barnett v. Glossop.* 633
18. The Defendant pleaded, that a promissory note on which the Plaintiff declared, was made by Defendant in *December* 1833, in pursuance of an agreement thereby to secure to *J. A.* money lost to him at play in *July* 1833: Held, that this plea was not supported by evidence, that in *July* 1833 Defendant gave *J. A.* a bill of exchange, payable six months after date, for 87*l.* lost at play, which bill *J. A.* endorsed to *V. K.*; and that in *December* 1833 Defendant substituted for this bill of exchange a promissory note for 100*l.* bearing date *September* 1833, and payable to the order of *V. K.* six months after date, being the note on which the Plaintiff sued. *Boulton v. Coghlan.* Page 640
19. To a plea, that work in respect of which Plaintiff sued, was not, according to agreement, done to the satisfaction of Defendant or his surveyor; Plaintiff replied, that it was done to the satisfaction of of Defendant *and* his surveyor; without this, that it was not done to the satisfaction of Defendant, or his surveyor: Held, that upon this issue it was sufficient to shew that the work was done to the satisfaction of the Defendant. *Bradley v. Milnes.* 644
20. Tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. *Wilkinson and Stennett v. Hall and Another.* 713
21. In a penal action against an attorney the Court refused to allow Plaintiff to amend after special demurrer. *Matthews v. Swift.* 735
22. The Court allowed Defendant to amend his plea after judgment on demurrer, upon an affidavit that material facts had come to his knowledge after such judgment. *Atkinson v. Bayntun.* 740
23. In debt for rent against an assignee, the Defendant traversed an averment in the declaration

that *all* the estate in the premises had vested in him. Issue having been joined, and the Defendant having proved that he was assignee of *part* only of the premises: Held, that the verdict on such issue must be entered for the Defendant. *Curtis v. Spitty*. Page 756

PRACTICE.

See ATTORNEY, 1. BANKRUPT, 1. INFANT, 1. PLEADING, 10. JUDGES. BAIL, 1, 2.

1. The affidavit in support of a motion to enter up judgment on a warrant of attorney need not now state, as formerly, that the Defendant was alive on a day in term. *Cockman v. Hellyer*. 3
2. The writ of *capias*, and writs which purport to be a continuance of it, must state the place where the Defendant resides, and if that be unknown, the place where he is supposed to reside. *Roberts v. Wedderburne*. 4
3. The actual or supposed place of the Defendant's residence must be stated in that part of the body of the writ prescribed by Schedule, No. 4., 2 W. 4. c. 39.
It is not sufficient to indorse it on the writ. *Lindredge v. Richard Roe*. 6
4. The names of two defendants having been inserted in the writ of summons, separate proceedings were taken against each: Held irregular. *Pepper v. Whalley*. 71
5. In C. P. judgment against the casual ejector must be moved for within the first four days of *Hilary*

and *Trinity* term, and within one week of the first day of *Michaelmas* and *Easter* term. *Doe and Langford v. Roe*. Page 161

6. Where Plaintiff had been misled by Defendant as to the nature of a charter-party, the Court permitted Plaintiff to amend by striking out a count in covenant on a charter-party, and declaring for freight not upon the charter-party:

And this, after many years had elapsed since the commencement of the action, the Defendant having been the cause of the delay. *Aylwin, Administrator of Dismorr, v. Todd*. 170

7. The House of Lords will not receive from the agent of the Plaintiff in Error a petition to refer to the Judges the legal points in the case. *Ricketts v. Lewis*. 196
8. Omission of the words "the" and "by" in the copy of the writ of *capias* prescribed by the schedule 2 W. 4. c. 39., Held not to invalidate an arrest. *Pocock v. Mason*. 245
9. A declaration in ejectment need not be entitled of a term, or of a particular day, *as* of a term. It is sufficient if it be entitled of a particular day. *Doe d. Ashman v. Roe*. 253
10. Certificate of cognizance of infant feme trustee. *In the Matter of S. Luke, an Infant, wife of G. Luke*. 265
11. After a rule to plead in *Easter* term, in an action on a bill of exchange, Defendant paid a portion of the bill, with costs to that time,

- and agreed to pay the residue with the costs of the action, the 1st of *October* following, if it were not previously paid by another party: no payment having been made according to the agreement, Held, that Plaintiff might sign judgment in *Michaelmas term*, without a fresh rule to plead. *Usborne and Another v. Pennell.* Page 320
12. Where a prisoner has been served with a rule to plead, the omission of an indorsement of notice to plead, on the declaration, will not render irregular a judgment signed for want of a plea. *Clementson v. Williamson.* 356
13. Quære, whether a writ of *capias* ought to disclose the county of the Defendant's residence. *Bosler v. Levy.* 362
14. Sheriff's costs upon interpleader. *Dabbs v. Humphries.* 412
15. The assignment of a bail bond must be executed in the presence of two witnesses, but it is not necessary that they should both subscribe their names in the presence of the officer assigning. *Phillips v. Barlow.* 433
16. Money paid into Court, in lieu of bail, but under a protest against the sufficiency of the affidavit to hold to bail, will not be paid out of Court to Defendant on the ground of the insufficiency of the affidavit. *Green v. Glassbrook.* 516
17. In *quare impedit* the writ was returnable *January* 8th, 1834. Defendants appeared *January* 11th, 1834. Plaintiff declared

- January* 10th, 1835. The Court set aside the declaration as too late. *Barnes v. Jackson and two Others.* Page 545
18. A commission to examine witnesses may be granted for the trial of an issue directed by the Court of Chancery. *Bourdeaux v. Rowe.* 721
19. The Court set aside a Judge's order for better particulars of set-off, on the ground that Plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained. *Finerty v. Smith.* 649
20. No rule for interpleading will be granted after a suit has been stayed by injunction. *Arayne v. Lloyd.* 720

QUARE IMPEDIT.

See PRACTICE, 17.

REGULA GENERALIS, 242. 411.

RENT CHARGE.

1. A rent charge is extinguished by a devise to the grantee of part of the land out of which the rent charge issues, notwithstanding the devise is expressly made over and above the rent charge.
2. Where a charge on the land is clear, and upon the construction

of a will, it is doubtful whether or not the testator meant to transfer the charge from the realty to the personalty, it will be held to continue a charge on the land. *Dennett v. Pass and Another.*

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REPUTED OWNERSHIP.

See BANKRUPT, 2.

ROYAL SIGN MANUAL.

Where an estate is devised on condition of the devisee's changing his name, it is sufficient if he changes it within a reasonable time, and it is not necessary that he should apply for the royal sign manual. *Davies and Wife, Demandants; W. S. Lowndes, Tenant.*

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SATISFACTION.

See PLEADING, 13.

SEA-WALLS.

See CORPORATION.

SEPARATION DEED.

See BARON AND FEME.

SET - OFF.

See COSTS, 10.

Held, that a Defendant might set-off a debt due to him from a bankrupt for money lent, &c. against a claim by the bankrupt's assignees on Defendant for not accepting, pursuant to agreement, a bill of ex-

STAMP.

change by way of part payment for goods sold and delivered by the bankrupt to the Defendant. *Gibson and Another, Assignees of David Rankine, a Bankrupt, v. Bell.*

Page 743

SHERIFF.

See PRACTICE, 14.

1. The Court refused to interfere in favour of the sheriff, under the interpleader act, where the undersheriff's partner appeared to be concerned for some of the parties. *Dudden v. Long.* 299
2. In trespass against bailiff and sheriff for taking Plaintiff on a charge of felony to a police station, and thence to a prison, the sheriff, after pleading the general issue, justified the taking from the police station to the prison under a *ca. sa.*

The Plaintiff admitting the suit, and the delivery of the warrant to the bailiff, replied, *de injuria absque residuo causæ*:

Held, that under this replication he could not involve the sheriff in misconduct of the bailiff committed before the Plaintiff arrived at the police station. *Price v. Peek and Others.* 380

STAMP.

See EVIDENCE, 1.

A lease contained a demise of two separate farms with two *habendums* differing from each other; a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one

TITHES.

farm, some to the other; the lessee entered on the whole at one time: Held, that one *ad valorem* stamp for the amount of both rents was sufficient. *Blount v. Pearman*.

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STATUTE OF LIMITATIONS.

See EVIDENCE, 6.

STAY OF PROCEEDINGS.

See BANKRUPT, 1.

SURETY.

See BANKRUPT, 4.

TENDER.

On a plea of tender of 1*l.* 12*s.* 5*d.* the jury found specially, that Defendant's attorney called on Plaintiff and said, "I come to pay you 1*l.* 12*s.* 5*d.* which Defendant owes you;" that the attorney put his hand in his pocket, but did not produce the money; that Plaintiff said, "I can't take it, the matter is now in the hands of my attorney:" Held, upon writ of false judgment, that such finding did not warrant a judgment for Defendant. *Finch v. Brooke*. 253

TITHES.

Notwithstanding an endowment of 1374, conferring all small tithes on a vicar, the court refused to set aside a verdict finding the right to potatoes grown in fields to be in

TROVER.

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the rector, evidence having been adduced from which it might be presumed that, on good consideration, an alteration had been made in the endowment previously to the restraining statute of 13 *Eliz.* *Gilbert and Others v. Towns*.

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TRESPASS.

See PLEADING, 15.

The Plaintiff declared for an assault in seizing and laying hold of him, pulling and dragging him about, striking him, forcing him out of a field into and through a pond, and there imprisoning him. Plea, justifying the assaulting, seizing, and laying hold of the Plaintiff, and pulling and dragging him about:

Held, no sufficient answer to the entire charge in the declaration. *Bush v. Parker and Others*. 72

TROVER.

R. being employed to procure a bill of exchange to be discounted for plaintiff, instead of doing so, indorsed it, and placed it in the hands of Defendant, who was clerk to a creditor of *R.* Defendant carried the bill to *R.*'s account with his creditor; and, though afterward apprised of the circumstances under which *R.* held the bill, refused to restore it: Held, that Defendant was liable to Plaintiff in trover. *Cranch v. White*. 414

TURNPIKE ACT, CONSTRUCTION OF.

1. By a local act a toll was imposed on horses *drawing carriages*; for default of payment the collector was authorized to distrain any *horse or carriage upon which toll was imposed* by that act. No person was to pay more than once a day in respect of any *carriage*, or any *horse*; and no toll was to be taken in respect of any *carriage*, horse, or beast conveying materials for the road:

Held, that the toll was imposed on the horse only, and not on the combination of carriage and horse; and that the same horse passing a second time the same day, with a different carriage and different passengers, was exempt from toll. *Niblett and Others v. Pottow.*

Page 81

2. Where a local turnpike act directs a higher or lower rate of toll to be collected in respect of the greater or lesser breadth of wheels, and where, in addition to the tolls under such local act, the additional tolls in respect of breadth of wheels authorized to be taken by 13 G. 3. c. 84. have been collected and imposed, although erroneously, parties are not relieved from such additional tolls by 4 G. 4. c. 95. s. 6. *Pickford and Others v. Davis.* 141

USE AND OCCUPATION.

See PLEADING, 1.

VARIANCE.

See PLEADING, 2. 18.

VENDOR AND PURCHASER.

See COSTS, 7.

The particulars of sale of certain leasehold premises in Covent Garden stated, that under the original lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house-keeper, or working-hatter."

The original lease, when produced, appeared to prohibit the businesses of brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-housekeeper, working-hatter, and many others, and the sale of coals, *potatoes*, or any provisions: Held, that there was such a material discrepancy between the particulars and the lease, as to entitle a purchaser to rescind his contract. *Flight v. Booth.* Page 370

VENUE.

Where, by consent of both parties, the *venue* was laid in *L.*: Held, that no objection could afterwards be taken to the *venue*, notwithstanding it ought, under an act of parliament, to have been laid in *S.* *Furnival v. Stringer.* 68

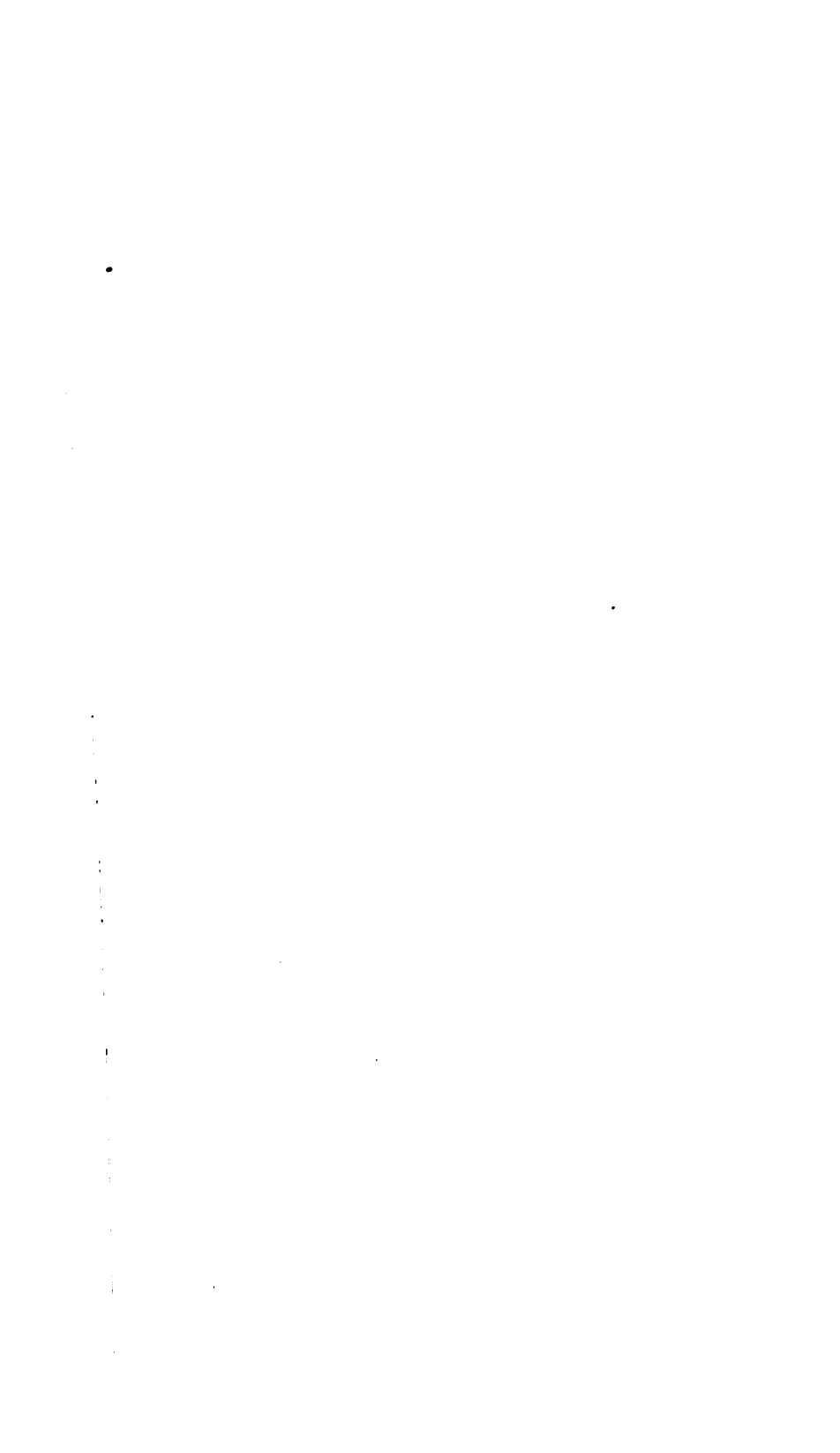
WARRANT OF ATTORNEY.*See PRACTICE, 1.***WAY.**

Defendants having erected on their own premises a permanent obstruction to a navigable drain leading from a river through Defendant's premises to Plaintiff's close, Held, that an action lay for the Plaintiff,

notwithstanding the portion of the drain which passed through the Plaintiff's close had for sixteen years been completely choked up with mud. *Bower v. Hill and Another.* Page 549

WRIT.*See PRACTICE, 2, 3, 4.***AMENDMENT.**

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